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Children and the International Criminal Court

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Analysis of the Rome Statute through a Children's Rights Perspective

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Dedicated to my two wonderful sons, Sebastiaan and Samuel.

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Cynthia Chamberlain
January 2014

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List of Acronyms

AFCtHPR	African Court on Human and Peoples' Rights
AFRC	Armed Forces for Revolutionary Council
ASP	Assembly of State Parties
CDF	Civil Defence Forces
CEDAW	Convention on the Elimination of all Forms of Discrimination against Women
CICC	Coalition for an International Criminal Court
CRC	Convention on the Rights of the Child
DRC	Democratic Republic of Congo
ECCC	Extraordinary Chambers in the Courts of Cambodia
ECECR	European Convention on the Exercise of Children's Rights
ECOSOC	United Nation's Economic and Social Council
ECtHR	European Court of Human Rights
GCU	Gender and Children Unit
IACtHR	Inter-American Court of Human Rights
IBA	International Bar Association
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICRC	International Committee of the Red Cross
ICTR	International Tribunal for Rwanda
ICTY	International Criminal Tribunal for Former Yugoslavia
IDP	Internally displaced persons
ILO	International Labour Organisation
IRS	Initial Response System
JCCD	Jurisdiction, Complementarity and Cooperation Division
NGOs	Non-governmental organisations
OAU	Organisation of African Unity
OPCD	Office of Public Counsel for the Defence
OPCV	Office of Public Counsel for Victims
OTP	Office of the Prosecutor
PrepCom	Preparatory Commission
PIDS	Public Information and Documentation Section
RoC	Regulations of the Court
RoR	Regulations of the Registry
RPE	Rules of Procedure and Evidence
RTFV	Regulations of the Trust Fund for Victims
RUF	Revolutionary United Front
SCSL	Special Court for Sierra Leone
TFV	Trust Fund for Victims

UNGA	United Nations General Assembly
UNHCR	United Nations High Commission on Refugees
UNICEF	United Nations Children's Fund
UNSC	United Nations Security Council
VPRS	Victims Participation and Reparations Section
VWU	Victims and Witnesses Unit

Introduction

1 Necessity and Legal Basis for the Inclusion of a Children's Rights Perspective in ICC Proceedings

The International Criminal Court (ICC) is the world's first international permanent court with jurisdiction to judge individuals for crimes of genocide, crimes against humanity, war crimes and aggression.

The Rome Statute[1] is a pioneering international treaty as it also provides for the participation of victims throughout the proceedings, not only as witnesses of the defence or the prosecution, but also as participants in judicial proceedings. Article 68(3) of the Rome Statute is the central provision related to victims' participation.[2] It states

> "(…) where the personal interests of the victims are affected, the Court *shall* permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court (…)" (emphasis added).

Another novelty from this international tribunal is that victims of crimes within its jurisdiction are entitled to receive reparations, either individually or collectively. Pursuant to Article 75(2) of the Rome Statute, the "Court may make an order directly against a convicted person (…) or in respect of victims, including restitution, compensation and rehabilitation".

Moreover, pursuant to Article 68(1) of the Statute, the "Court *shall* take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses" having regard to all relevant factors, including "age, gender (…) health, and the nature of the crime,

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1 *Rome Statute of the International Criminal Court* (Rome Statute), original document is A/CONF.183/9 of 17 July 1998, UN Treaty Series, vol. 2187, No. 38544, p. 3. The treaty was corrected by procès-verbaux of 10 November 1998, 12 July 1999, 30 November 1999, 8 May 2000, 17 January 2001 and 16 January 2002. Amendments to article 8 reproduce the text contained in depositary notification C.N.651.2010 Treaties-6, while the amendments regarding articles 8 *bis*, 15 *bis* and 15 *ter* replicate the text contained in depositary notification C.N.651.2010 Treaties-8; both depositary communications are dated 29 November 2010. The Rome Statute is available at: < http://www.icc-cpi.int/NR/rdonlyres/ADD16852-AEE9-4757-ABE7-9CDC7CF02886/283503/RomeStatutEng1.pdf > accessed 2 April 2013.

2 See also Articles 15(3) and 19(3) of the Rome Statute, which refer to other manners of victims' participation in the initial stages of ICC proceedings (authorisation to open an investigation and jurisdiction and admissibility proceedings).

in particular…where the crime involves sexual or gender violence or violence against children" (emphasis added).

These provisions are innovative and an advance in international criminal law, which goes, unlike the predecessors of the ICC, beyond the purely retributive nature of judicial proceedings, and includes a restorative mandate, that encompasses the possibility for victims to express their views in international criminal trials as well as the possibility to receive reparations for the harms suffered. However, the advances made with the adoption of the Rome Statute need to be applied to concrete situations currently investigated by the ICC's Prosecutor and in particular cases against accused persons.

In order to fulfil this pioneering mandate of the ICC, relevant expertise in these innovative features is required within the ICC.[3] Accordingly, Articles 36(8)(b), 42(9) and 44(2) of the Rome Statute provide that the ICC should have judges, advisers and staff members with legal expertise on specific issues, including among others, violence against children.

As regards child victims and witnesses, the Rome Statute's legal framework clearly compels the ICC to consider their needs in international criminal proceedings. The Preamble of the Rome Statute explicitly refers to children as victims of the most serious crimes within the ICC's jurisdiction and calls to end impunity for these crimes. Article 68(3) of the Rome Statute provides that in order to protect victims and witnesses, their age and also whether the crime involves violence against children, should be, among other factors, considered. Rule 86 of the Rules of Procedure and Evidence (RPE), which directly relates to Article 68 of the Statute, provides:

> "A Chamber in making *any direction or order*, and other organs of the Court *in performing their functions* under the Statute or the Rules, *shall* take into account the needs of all victims and witnesses in accordance with article 68, in particular, *children*, elderly persons, persons with disabilities and victims of sexual or gender violence." (emphasis added)

These legal provisions reflect that, although a criminal court with clear penal mandate, the ICC also has the obligation to respect, as a minimum, the safety and well-being of victims and witnesses, particularly those who are most vulnerable, such as children. It also reflects the developments in human rights law to focus on children in judicial proceedings, both at the international and national level.[4]

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3 See the *Statement by Ms Eva Boenders, Caucus on Children's Rights in the ICC*, 16 June 1998, ICC Preparatory Works, available at < http://www.legal-tools.org/en/doc/61113c/ > (accessed 4 April 2013).

4 For example UNICEF affirmed in a preparatory document for the Rome Conference that the "legal safeguards recognized in international human rights law, particularly the CRC, should be effectively secured" in the ICC. UNICEF then stated that child witnesses and victims should benefit from "legal and other appropriate assistance" and that consideration

In spite of these innovations, the ICC has faced immense challenges when implementing these legal provisions in its initial cases during its first ten years of existence. The first case before the ICC, the Prosecutor v. Thomas Lubanga Dyilo (*Lubanga case*),[5] involves exclusively charges of enlistment, conscription and use of children under the age of 15 to participate actively in the hostilities. This case faced unimaginable difficulties, which could explain why it is still ongoing after more than seven years since Mr Lubanga's first appearance before the judges at The Hague.[6] Although the ICC's Trial Chamber I rendered a conviction and a sentence in 2012 against Mr Lubanga (after more than three years since the trial had started),[7] to date, appeals on these two decisions are still pending and reparations for victims of crimes included in the charges are also still waiting a resolution of the Appeals Chamber and implementation by the Trust Fund for Victims (TFV).

Within this complex first ICC case, children were at the centre of ICC proceedings, and thus its achievements and failures are a vivid example of the advances and drawbacks of the ICC's mandate vis-à-vis children. The prosecution's "key witnesses" included ten alleged former child soldiers.[8] The victims authorised to participate in the proceedings, 129 in total, were mainly former child soldiers and their relatives.[9] This case was undoubtedly ground-breaking as it was the first time that victims of crimes (and particularly child victims) actively participated in ICC proceedings and had the possibility to request reparations. However, the experience of this first trial may not be at all positive as regards the ICC's fulfilment of its mandate as regards children. Child witnesses in the Lubanga case were subject to multiple interviews and

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should be given to the "special needs of the child", particularly making reference to the need to secure a "child-friendly" environment. See: *UNICEF and the Establishment of the International Criminal Court* (17 March 1998) ICC Preparatory Works, available at < http://www.legal-tools.org/en/doc/f0fa26/ > (accessed 4 April 2013) p. 5. Likewise, in the Rome Conference the Special Representative of the United Nation's Secretary General on Children and Armed Conflict at the time also appealed that ICC provisions should be consistent with international standards, including, among others, the CRC. See: *Message from Olara A. Qtunnu, Special Representative of the Secretary-General for Children and Armed Conflict to the Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court* (17 June 1998), ICC Preparatory Works, available at < http://www.legal-tools.org/en/doc/ed4ff7/ > (accessed 4 April 2013).

5 ICC-01/04-01/06.

6 A timeline of the Lubanga case can be found at: < http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200104/related%20cases/icc%200104%200106/Pages/democratic%20republic%20of%20the%20congo.aspx > accessed 2 April 2013.

7 *Lubanga case* 'Judgment pursuant to Article 74 of the Rome Statute' (14 March 2012) ICC-01/04-01/06-2842; *Lubanga case* 'Decision on Sentence pursuant to Article 76 of the Rome Statute' (10 July 2012) ICC-01/04-01/06-2901.

8 *Lubanga case* 'Judgment pursuant to Article 74 of the Rome Statute' (14 March 2012) ICC-01/04-01/06-2842, paras 480-481.

9 *Lubanga case* 'Judgment pursuant to Article 74 of the Rome Statute' (14 March 2012) ICC-01/04-01/06-2842, paras 15-17.

strenuous cross-examinations.[10] The first witness to testify in trial, an alleged former child soldier, recanted and stated in court that he had lied to prosecution investigators and ICC judges.[11] The defence case was based mostly on credibility issues surrounding the child witnesses brought by the prosecution.[12] In its conviction decision, the Trial Chamber ultimately found that all child witnesses in the Lubanga case, except for one, were unreliable.[13] For those child witnesses who were also victims participating in the proceedings, their participatory status was removed as a consequence of their contradictory testimonies.[14] The Trial Chamber also found that intermediaries had most likely manipulated these children and possibly committed offences against the administration of justice.[15]

Consequently, the Lubanga case demonstrates that the current ICC practice does not adequately protect the safety, physical and psychological well-being, dignity and privacy of children interacting with the ICC, either as witnesses or victims of crimes within the ICC's jurisdiction, pursuant to Article 68 of the Rome Statute. It also raises the issue of whether children should at all testify in international trials (particularly *viva voce* in The Hague) and whether the current victims' participation system is suitable for child victims who may want to present their "views and concerns" to ICC judges pursuant to Article 68(3) of the Rome Statute.

However, not investigating crimes committed against children (particularly when the Prosecutor has received information or evidence that this has occurred) or excluding children from ICC proceedings (when this is not contrary to their best interests) is not a legitimate course of action, particularly in light of Articles 68 and 75 of the Rome Statute and Rule 86 of the RPE mentioned above, read in unison with Article 21(3) of the Rome Statute, which enshrines the principle of non-discrimination.[16] These legal provisions in fact give the

10 *Lubanga case* 'Judgment pursuant to Article 74 of the Rome Statute' (14 March 2012) ICC-01/04-01/06-2842, para. 479; 'Separate and Dissenting Opinion of Judge Odio Benito', para. 32.

11 *Lubanga case* 'Judgment pursuant to Article 74 of the Rome Statute' (14 March 2012) ICC-01/04-01/06-2842, para. 430.

12 Lubanga case 'Requête de la Défense aux fins d'arrêt définitif des procédures' (12 August 2011) ICC-01/04-01/06-2657-tENG-Red.

13 *Lubanga case* 'Judgment pursuant to Article 74 of the Rome Statute' (14 March 2012) ICC-01/04-01/06-2842, paras 479-480.

14 *Lubanga case* 'Judgment pursuant to Article 74 of the Rome Statute' (14 March 2012) ICC-01/04-01/06-2842, para. 484.

15 *Lubanga case* 'Judgment pursuant to Article 74 of the Rome Statute' (14 March 2012) ICC-01/04-01/06-2842, paras 482-483.

16 Article 21(3) of the Rome Statute provides as follows: The application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights, and be without any adverse distinction founded on grounds such as gender as defined in article 7, paragraph 3, *age*, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status (emphasis added).

legal basis to focus on children as a group requiring special attention by the ICC, particularly when fulfilling the ICC's mandate to "protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses" pursuant to Article 68 of the Rome Statute.[17] As noted by De Brouwer and Heikkila, even though victims of crime may not have special rights granted by international human rights treaties, they do have "general rights" such as the right to privacy and the right to an effective remedy.[18]

Nonetheless, these provisions are general and "all-purpose", and enclose within the same protection umbrella groups as varied and distinct as children, elderly persons, persons with disabilities and victims of gender and sexual violence, all of them requiring special protection vis-à-vis their particular needs. Rule 86 of the RPE refers to the "needs" of victims and witnesses, but does not set down what these are. However, read together with Article 68 of the Rome Statute, one can conclude that the "needs" of children should be those related to the protection of their "safety, physical and psychological well-being, dignity and privacy", and not other needs that may be unrelated to the judicial process.[19]

While other provisions in the ICC Statute (such as Article 67 on the rights of the accused) are much clearer and their contents defined more in-depth,[20]

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17 It is important to note, however, that children are not a uniform group, and that within a children's rights perspective, other groups should also be taken into consideration (*i.e.* girl-child, children with disabilities, indigenous children, etc.). Hence, various perspectives interrelate, depending on the needs of victims and witnesses, which ultimately are to be determined on case-by-case basis by the ICC. Only if judges and other organs of the ICC take into consideration these different, yet intersected needs of victims and witnesses, will the ICC fulfill its mandate pursuant to Rule 86 of the RPE above and the principle of non-discrimination enshrined in Article 21(3) of the Rome Statute. See for example, Coalition on Women's Human Rights in Conflict Situations '*Concerns Regarding the Rights of the Girl-Child in Armed Conflict Situations*' submissions to the ICC Preparatory Commission Inter-sessional Meeting, Siracusa, Italy, 31 January to 4 February 2000, available at < http://www.legal-tools.org/en/doc/e5389c/ > (accessed 4 April 2013).

18 Anne-Marie De Brouwer and Mikaela Heikkila, in: Goran Sluiter and others (eds), *International Criminal Procedure, Principles and Rule*s (Oxford University Press 2013) 1338.

19 As noted by Donat-Cattin, the Rome Statute sets a high standard of protection for victims and witnesses in Article 68 of the Rome Statute and includes children within the group of vulnerable survivors who are always at risk of re-victimisation. See David Donat-Cattin in Otto Triffterer (ed), *Commentary on the Rome Statute of the ICC: Observers' Notes, Article by Article* (2nd Edn), Nomos Verlagsgesellschaft 2008), p. 1281-1282.

20 For example, the rights of the accused person are clearly spelled out in Article 67 of the Rome Statute, literally duplicating the rights provided for in the ICCPR and other human rights instruments. This also is a clear example of the inherent interaction between international criminal law and international human rights law. See the *International Covenant on Civil and Political Rights*, UNGA Resolution 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entry into force 23 March 1976, article 14; Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols No 11 and 14*(4 November 1950) ETS No 5, article 6; Organisation of American States, *American Convention on Human Rights ("Pact of San Jose", Costa Rica)* (22 November 1969), article 8.

the concept of "needs" of Rule 86 of the RPE needs to be determined by ICC judges and other organs of the ICC in performing their functions.

In light of this general provisions as regards witnesses and victims, it is necessary to resort to other applicable law pursuant to Article 21 of the Rome Statute in order to give more specific substance to the term "needs of witnesses and victims" and their "safety, physical and psychological well-being, dignity and privacy", and for the purpose of this research, children, as provided for in Rule 86 of the RPE. Hence, a comprehensive study of the ICC's legal framework from a children's rights perspective is necessary so that interaction of children as witnesses and victims in ICC proceedings does not compromise their "safety, physical and psychological well-being, dignity and privacy" pursuant to Article 68 of the Rome Statute. For example, when the ICC takes a decision pertaining to a child witness's relocation, it could refer to Article 9 of the UN Convention on the Rights of the Child (CRC) as regards the child's separation from his or her parents, Article 12 of the CRC in order to take into consideration the child witness's views, among CRC other provisions.

Moreover, as demonstrated in the *Lubanga case*, measures to protect children interacting with the ICC, and particularly child witnesses, are not necessarily in disagreement with the rights of the accused or the right to a fair trial. In fact, pursuant to Article 68 of the Rome Statute, these measures should not be prejudicial or inconsistent with the rights of the accused and a fair and impartial trial. Additionally, these measures may be necessary to protect the integrity of a fair trial against the accused person and also to prevent crimes against the administration of justice that may be committed taking advantage of the age of young victims and witnesses. As will be further analysed in this research, measures such as an improved method for screening child witnesses and measures to preserve their testimonies through time, are not only necessary pursuant to Article 68 of the Rome Statute, but also in order to safeguard the rights of the accused to a fair trial pursuant to Article 67 of the Rome Statute.[21]

2 Aim of the Research and Statement of the Problem

Although, as noted above, the legal framework of the ICC contains child-specific rules, which provide the legal basis for the adoption of child-sensitive measures

21 While victims of crime are only granted indirect protection in human rights conventions, accused persons are given a prominent place therein. However, the rights of victims to participate in ICC proceedings and the rights of victims and witnesses to protection do not violate *per se* the rights of the accused person. As noted by De Brouwer and Heikkila, victims' rights do not justify violations of the accused person's rights. This is in fact expressly provided for in Article 68(3) of the Rome Statute. See: Anne-Marie De Brouwer and Mikaela Heikkila, in: Goran Sluiter and others (eds), *International Criminal Procedure, Principles and Rules* (Oxford University Press 2013) 1339-1340.

throughout the entirety of the judicial proceedings, these provisions only offer a very general legal context. Given their broad spectrum, their implementation in ICC proceedings may be challenging, especially considering the particularities of all situations in which the ICC is currently involved and the individual situation of a child victim or witness interacting with the ICC.[22]

Consequently, the general ICC provisions (*lex generalis*) should be applied and interpreted using other existing international instruments related to children (*lex specialis*). This research project identifies these other applicable sources of law that could be useful in the implementation of children's rights within the ICC's work and gives more specific content to the general ICC provisions using international instruments that have been adopted in recent years for the development of children's rights. It thus intends to progress the ICC's practice vis-à-vis child victims and witnesses applying and interpreting the general ICC provisions taking into account international children's rights standards. As will be further analysed in Chapter 3 of this research, pursuant to Article 21(3) of the Rome Statute, interpretation and application of the Rome Statute and other ICC provisions in light of human rights standards is compulsory.

The main research question is:

> *How should ICC proceedings address the needs of children in accordance with Rule 86 of the RPE, in order to: a) protect the safety, physical and psychological well-being, dignity and privacy of child victims and witnesses pursuant to Article 68(1) of the Rome Statute; b) guarantee that the views and concerns of child victims are taken into consideration as provided for in Article 68(3) of the Rome Statute; and c) provide reparations to child victims pursuant to Article 75 of the Rome Statute?*

The next sub-questions are answered in the following chapters:

Chapter 1:
- What is the role of children in current armed conflicts and in situations that fall under the jurisdiction of the ICC?
- How do international crimes affect children (as victims and as perpetrators)?

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22 The ICC is currently dealing with 8 situations: Uganda, Democratic Republic of Congo, Darfur (Sudan), Central African Republic, Kenya, Libya, Cote d'Ivoire and Mali. Within these situations, the ICC has 18 pending cases in pre-trial, trial and appeal. For an updated overview of the cases: <http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/Pages/situations%20and%20cases.aspx> accessed 27 February 2013. On 14 May 2013, the Prosecutor of the ICC received a referral from the Union of the Comoros, "with respect to the 31 May 2010 Israeli raid on the Humanitarian Aid Flotilla bound for Gaza Strip". See: < http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/pr926.aspx > accessed 7 August 2013.

Chapter 2:
- Which are the ICC's main organs and what are their fundamental functions, powers and duties and how can they guarantee children's adequate interaction as victims and witnesses with the ICC?

Chapter 3:
- What is the legal framework applicable to the ICC pursuant to Article 21 of the Rome Statute in order to fulfil the ICC's mandate to address the needs of children and protect the safety, physical and psychological well-being, dignity and privacy?
- What other international instruments, not applicable pursuant to Article 21 of the Rome Statute, could still serve as guidance when dealing with children's protection in ICC proceedings?

Chapter 4:
- Which crimes within the jurisdiction of the ICC are child-specific or disproportionately affect children and how have these crimes been defined in the Rome Statute and international jurisprudence developed thus far?
- How can the definition of these crimes affect the procedural status of children at the ICC, including their victim's status pursuant to Rule 85 of the RPE?

Chapter 5:
- Which are the existing legal framework, practice and jurisprudence of the ICC as regards victims' participation, witnesses' protection and victims' reparations vis-à-vis internationally recognised children's rights?
- What challenges does the ICC face in the implementation of internationally recognised children's rights in its judicial proceedings and what measures could be taken to improve or adapt the ICC practice from a children's rights perspective?

Chapter 6:
- What are the main conclusions regarding advances, drawbacks and challenges of the ICC as regards children's rights?
- Which guidelines could be proposed to the ICC in order to transversally include a children's rights perspective in ICC proceedings?

3 The Concept of "Child victims and Witnesses"

It is important to clarify that throughout this research the concept of "child victims and witnesses" is used to denote a wide category of individuals who interact differently with the ICC.

As will be further analysed in Chapter 3, the CRC gives a clear indication as to the concept of child, namely someone below the age of 18.[23] Thus, pursuant to Rule 85 of the RPE, the CRC and the ICC case law, a child victim is "someone who experienced (when he or she was under the age of 18) personal harm, individually or collectively with others, directly or indirectly, in a variety of different ways such as physical or mental injury, emotional suffering or economic loss" as a result of the commission of a crime within the jurisdiction of the ICC.[24] Recently, Trial Chamber V has defined "victims" for the purposes of protection, as "a victim whose identity has been disclosed to the parties following the Chamber's preliminary review of his or her application and submission of that application to the parties for comments".[25]

As will be analysed further in Chapter 5, a victim or witness should be considered a child at the time of the relevant crimes, and not in relation to his or her age at the time of his or her interaction with the ICC.

Within the concept of "child victim" there are however different categories or ways in which children may interact with the ICC. It is important to refer to them at the outset, in order to clarify the concept of "child victim" in ICC proceedings.

Firstly, the term "child victims" include individuals who participate in proceedings pursuant to Article 68(3) of the Rome Statute.[26] As will be further analysed in Chapter 5, in order to become a victim under this provision, individuals should apply for participation pursuant to Rule 89(1) of the RPE. This concept of victims is not limited to direct victims or even immediate family members.[27] Moreover, the latest ICC case law has also opened the possibility for a collective approach to victims' participation, and thus the concept of "child victims" could also include groups of victims, either exclusively made of individuals who were under the age of 18 at the time of

23 The Elements of the Crimes also establish that a "child", for the purposes of Article 6(e) is a person under the age of 18 years.

24 *Lubanga case* 'Judgment pursuant to Article 74 of the Rome Statute' (14 March 2012) ICC-01/04-01/06-2842, para. 14; *Lubanga case* 'Decision on victims' participation' (18 January 2008) ICC-01/04-01/06-1119, paras 90-92; *Lubanga case* 'Judgment on the appeals of The Prosecutor and The Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008' (11 July 2008) ICC-01/04-01/06-1432, paras 31-39.

25 The Prosecutor v. William Samoei Ruto and Joshua Arap Sang (*Ruto and Sang case)* 'Decision on the supplementary protocol concerning the handling of confidential information concerning victims and contacts of a party with victims' (12 November 2012) ICC-01/09-01/11-472, para. 5.

26 As noted by McGonigle Leyh, this is the concept of "victim participant". See Brianne McGonigle Leyh, *Procedural Justice? Victim Participation in International Criminal Proceedings*, (Intersentia 2011), 235.

27 Brianne McGonigle Leyh, *Procedural Justice? Victim Participation in International Criminal Proceedings* (Intersentia 2011) 233-234.

the crimes, or including both adults and children within the same "collective" approach.[28]

Secondly, the term child victim also includes victims who make representations in accordance with Articles 15(3) and 19(3) of the Rome Statute. As will be further studied in Chapter 5, these representations are not much regulated, and thus can include individual and collective approaches, as varied and diverse as an e-mail communication, a video to a fully filled-in application form.[29]

Thirdly, the concept of child victim also includes victims who benefit from reparations, either individually or collectively, as ordered by a Chamber or implemented by the TFV pursuant to an order of the Chamber or within the TFV's assistance mandate.

As regards the concept of "child witness", it denotes individuals who witnessed a crime within the jurisdiction of the ICC when they were under the age of 18 (at the time of the events), regardless of the age they have when they testify in court.

The definition of "witness" given by Trial Chamber V in the two cases pending in the Situation in the Republic of Kenya (*Kenya situation*) could be helpful to determine this concept for the purposes of the present research:

> "(…) a witness is a person whom a party or participant intends to call to testify during the trial proceedings, provided that such intention has been conveyed to the non-calling party, either by the calling party including the individual on its filed witness list, or by the witness informing the non-calling party that he or she has agreed to be called as another party's witness, or by any other means that establish a clear intention on behalf of the calling party to call the individual as a witness and that this individual has consented thereto."[30]

The term thus includes witnesses of the prosecution, the defence, the legal representatives of victims and the Chamber, as these are all capable to present evidence in ICC proceedings.

However, for the purpose of protection pursuant to Article 68(1) of the Statute, and pursuant to Article 54 of the Rome Statute, the interests of "witnesses" shall be respected from the preliminary proceedings, during the

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28 *Kenyatta and Muthaura case* 'Decision on victims' representation and participation' (3 October 2012) ICC-01/09-02/11-498. An identical decision was issued in the other case in the *Ruto and Sang case* : 'Decision on victims' representation and participation' (3 October 2012) ICC-01/09-01/11-460. For the ease of reference, this research will refer solely to the decision filed in the *Kenyatta and Muthaura case*. This decision will be further analysed in Chapter 5.

29 As noted by McGonigle Leyh, this is the concept of "victim claimant". See Brianne McGonigle Leyh, *Procedural Justice? Victim Participation in International Criminal Proceedings*, (Intersentia 2011), 235.

30 *Ruto and Sang case,* 'Decision on the protocol concerning the handling of confidential information and contacts of a party with witnesses whom the opposing party intends to call' (24 August 2012) ICC-01/09-01/11-449, Annex 1, para. 1.

investigation phase. Thus, the term "witness" also includes individuals who are approached by the ICC from the initial stages of the investigation, even if these individuals do not eventually become "trial witnesses".

Likewise, "other persons at risk", which encompasses an even broader concept that "victims" and "witnesses" are also entitled to protection. Trial Chamber V of the ICC has also defined this term to include persons at risk on account of their activities for the Court or on account of the testimony / statements given by others.[31] The same Chamber has recently emphasised that protection is not only due vis-à-vis victims and witnesses, but also as regards "other persons who might be at risk as a result of the activities of the Court".[32] It further determined that "potential witnesses" should be considered as "other persons at risk", until they become witnesses in proceedings.[33] Family members of witnesses are also considered within this broad category of "other persons at risk".[34]

In many instances children will be both victims and witnesses and thus have a "dual status". As will be further analysed in Chapter 5, the rights and the protection afforded to an individual child may vary depending on his or her interaction with the ICC. For example, although the ICC judges have thus far allowed the participation of anonymous victims, there have not been any anonymous witnesses vis-à-vis the accused persons.

4 Research Methodology

The main point of departure of this study is the Rome Statute, and pursuant to Article 21 of this treaty, other applicable law, including ICC provisions found in the Elements of Crimes, the RPE, the Regulations of the Court (RoC), the Regulations of the Registry (RoR), and the Regulations of the Trust Fund for Victims (RTFV). Pursuant to Article 21 of the Rome Statute, other international instruments on children's rights, particularly the CRC, are applied in order to provide child-specific contents to the ICC provisions. Other international legal sources have been consulted, particularly UN resolutions, regional human rights case law, as well as other "soft law" instruments, which could be significant to ICC proceedings.[35]

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31 *Ruto and Sang case,* 'Decision on the protocol concerning the handling of confidential information and contacts of a party with witnesses whom the opposing party intends to call' (24 August 2012) ICC-01/09-01/11-449, Annex 1, para 2.

32 *Ruto and Sang case* 'Decision on the protocol establishing a redaction regime' (5 October 2012) ICC-01/09-01/11-458-AnxA-Corr, para. 44.

33 *Ruto and Sang case* 'Decision on the protocol establishing a redaction regime' (5 October 2012) ICC-01/09-01/11-458-AnxA-Corr, para. 1.

34 *Ruto and Sang case* 'Decision on the protocol establishing a redaction regime' (5 October 2012) ICC-01/09-01/11-458-AnxA-Corr, para.56.

35 The Appeals Chamber at the ICC concluded that "soft law" instruments may be used as "guidance". See *Lubanga case* 'Judgment on the appeals of The Prosecutor and The Defence

This research also thoroughly analyses the ICC's practice and jurisprudence in relation to participation of victims, protection of victims and witnesses and reparations to victims of crimes within the jurisdiction of the ICC. The date of 1 April 2013 has been used as cut-off date for consulted ICC case law.

This research does not aim to recapitulate on the extensive and innumerable sources that are widely available regarding the ICC's jurisdiction or the situation of children in armed conflict, particularly the phenomenon of child soldiers. Although this research does not intend in any way to be an academic research which comprehensively analyses the social, economical and political effects of armed conflict on children around the world, it refers to the general situation of children in armed conflict in Chapter 1 in order to contextualise the circumstances in which crimes against children are committed and the role children play in modern armed conflicts.

This research is based mainly on international legal instruments and international case law. Thus, it does not refer, albeit for some few exceptions, to legal instruments or practices of national jurisdictions. The legal and jurisprudential sources on which this study is based were obtained through extensive and thorough research of legal instruments and digital research of case law of the international tribunals (namely the ICC, the Special Court for Sierra Leone (SCSL) and to an extent, the ad-hoc tribunals). The author, as a staff member of the ICC, has also applied her own personal experience in ICC proceedings in the development of this research.[36] Furthermore, this study solely refers to information that is publicly available through the ICC's website or other public sources.

This research follows classic legal methodology and is thus limited to the use of legal texts and case law. It has not thoroughly analysed the wider impact that ICC proceedings may have according to studies of other disciplines such as psychology, sociology or anthropology. This, however, is an interesting field of study that could be developed in the future by a multi-disciplinary group of researchers and that would undoubtedly contribute to the understanding of ICC proceedings beyond the legal perspective.

5 Structure of the Thesis

This research is divided into 6 chapters.

Chapter 1 gives a general introduction to the role of children in current armed conflicts, which sets the general context of the situation of children who

against Trial Chamber I's Decision on Victims' Participation of 18 January 2008' (11 July 2008) ICC-01/04-01/06-1432, para. 33. The legal status of these "soft law" instruments is further analysed in Chapter 3.

36 The views expressed in this research are those of the author and in no way reflect those of the ICC.

will come to the ICC either as victims or witnesses of crimes within its jurisdiction. It first describes how violence against children has become a weapon of war in many current armed conflicts. It then analyses the impact that crimes against children have on their lives and those of their families and communities. However, it goes beyond the role of children as victims of armed conflict and analyses the complicated reality of many children that are also perpetrators of crimes within the context of an armed conflict, particularly the situation of child soldiers. Finally, this chapter focuses on the significant role that children could play as participants in the peace and reconciliation process, including their participation in international justice as well as non-judicial mechanisms. Chapter 1 thus illustrates that child victims and witnesses are not simply "vulnerable" individuals. Children appearing before the ICC include children who may be perpetrators of crimes (albeit not within the ICC's jurisdiction). Likewise, as a result of armed conflict, children appearing before the ICC could also be more empowered, mature and independent that children in other situations. This analysis is important since these multifaceted aspects of children in armed conflict should be taken into consideration when dealing with children's interaction with the ICC in Chapters 5 and 6 of this research.

Chapter 2 is a brief introduction to the ICC, its establishment and its main organs. This introduction is made through a children's rights perspective, thus focusing on how the different organs of the ICC should work in order to fulfil the ICC's mandate pursuant to Rule 86 of the RPE. It is also an important Chapter to introduce the organisation and structure of the ICC, particularly since different organs and sections of the ICC are later mentioned and referred to in Chapters 5 and 6 of this research. Although this Chapter may be superfluous for readers with knowledge on the ICC, it could be of value for readers who, although knowledgeable in children's rights, may not be acquainted to the ICC's structure and functioning.

Chapter 3 focuses on the relevance of other international instruments for the interpretation and application of ICC provisions in proceedings related to child victims and witnesses. This Chapter takes as initial point Article 21 of the Rome Statute, and mainly paragraph 3, which requires ICC judges to interpret and apply the law in accordance with internationally recognised human rights. As regards children, the logical point of departure is the CRC. The Chapter also refers to other sources of law that, although not applicable law *per se* pursuant to Article 21 of the Rome Statute, could serve as guidance for ICC judges when interpreting the law. Finally, this Chapter analyses international case law that may be relevant and applicable for child victims and witnesses before the ICC. In particular, the jurisprudence of the SCSL is analysed regarding crimes of enlistment, conscription and use of children to participate actively in the hostilities and crimes of sexual violence. Furthermore, the case law of the regional human rights courts is studied. Of great significance is the case law of the Inter-American Court of Human Rights (IACtHR), particularly in

relation to reparations. The analysis contained in Chapter 3 thus gives the legal basis for the use of other international instruments in the following chapters.

Chapter 4 focuses on the substantive law of the ICC. It describes very briefly the ICC's jurisdiction. The Chapter then thoroughly describes crimes committed exclusively against children but also crimes that, although committed against the general population, have disproportionate effects on child victims. This analysis is of significance, since children will interact with the ICC when they are victims or witnesses of crimes within its jurisdiction. Thus, the analysis of the elements of crimes is necessary to identify who are the child victims and witnesses at the ICC. For example, in order to establish whether a child is a victim within the jurisdiction of the ICC pursuant to Rule 85 of the RPE, an analysis of the elements of the relevant crimes is required. Likewise, in order to establish the harms suffered in reparations proceedings, an analysis of the crimes committed against children and the effects that these crimes have upon them is fundamental. This Chapter is also important to understand the particular circumstances of child victims and witnesses addressing the ICC, who may need protective or special measures as a result of the crimes (*i.e.* a child witness with a post-traumatic stress disorder as a consequence of sexual violence). Thus, although this Chapter analyses the substantive law of the ICC, it ultimately has significant bearing on the procedural issues discussed in Chapters 5 and 6 of this research.

Chapter 5 is the *pièce de résistance* of this research, as it focuses on the three manners in which children can interact with the ICC: as participating victims, as witnesses and as beneficiaries of reparations. It analyses the existing legal framework and practice at the ICC, but also provides examples of how other applicable law related to children's rights could be of use in proceedings in which children interact with the ICC. This Chapter proposes different methods, standards and good practices that could be adopted in ICC proceedings in order to take into consideration the needs of child victims and witnesses pursuant to Rule 86 of the RPE.

Chapter 6 proposes a series of recommendations that could be adopted in order to guarantee the active participation and reparations of child victims in ICC proceedings in accordance with international standards in children's rights and also pursuant to Rule 86 of the RPE. The Chapter also proposes measures that could be taken when children appear as witnesses in proceedings before the ICC, in order to make their experience non-traumatic, but also in order to guarantee the rights of the accused and a fair trial. The final chapter also proposes a series of guidelines, which provide specific parameters in order to fulfil the mandate of the ICC as provided for in Article 68 of the Rome Statute and Rule 86 of the RPE and pursuant to international children's rights standards.

1 Armed conflict and children

1.1 INTRODUCTION

In order to understand the position of children before the ICC, it is important to understand the impact that international crimes have upon them. Crimes within the ICC's jurisdiction are no ordinary crimes, and often will be massive or systematic and have serious consequences on the lives of children and their communities. This Chapter aims to give a general overview of the different roles that children play in armed conflict and other situations where the ICC may exercise its jurisdiction: as civilian victims, as participants in hostilities and also as key players in peace, reconciliation and justice mechanisms. It is important to acknowledge that many children coming before the ICC will fulfil these three roles in one way or another. Even though they may seem incompatible, they are all part of the paradox reality of armed conflict and its effect on children. As noted by Drumbl, any type of labelling or category of child image, particularly as regards child soldiers, may inordinately simplify the complex lives and experiences of children.[1] Hence, this Chapter will try to describe the various "images" of children, beyond vulnerable victimhood. It will describe children as perpetrators of heinous crimes but also as potential peacemakers in judicial and non-judicial justice mechanisms.

Although children may be resilient and endure extreme situations of armed conflict, the experiences they surpass may also have an effect on the way they will interact with the ICC either as participating victims or as witnesses in court. As will be analysed further below in this research, crimes committed against children may affect the child's capacity to trust adults (*i.e.* including lawyers and judges), and they may also corrode the child's moral values (*i.e.* importance of an oath and telling the truth). Thus, it is important to take this into account in order to protect the child's well-being in accordance with Article 68(1) of the Statute, but also to protect the probative value, reliability and truthfulness of their evidence as witnesses and ultimately protect the fairness of proceedings at the ICC.

1 Mark Drumbl, *Reimagining Child Soldiers in International Law and Policy* (Oxford University Press 2012) 6-7.

1.2 Children as Victims of Armed Conflict and Gross Violations of Human Rights

1.2.1 Violence against children as a method of war

In general, crimes against humanity and genocide can occur in times of peace, but frequently crimes under the jurisdiction of the ICC are committed during times of war.[2] A well-known fact today is that while during World War I the number of civilian victims rose to 5% of the total war casualties, civilian victims of armed conflict nowadays represent 90% of the war victims.[3] The distinction between combatants and civilians has thus disappeared from most modern conflicts and civilians have become the main targets of warfare.

As noted by Kuper, children experience armed conflict differently from adults. They are often physically, economically, politically and militarily powerless in armed conflict situations.[4] In response to the growing effects of armed conflict on civilians, and particularly children, the United Nations General Assembly (UNGA) decided to appoint an expert on the impact of armed conflict on children in 1993.[5] In her 1996 report, the Special Representative gave, for the first time, a full view of the unprecedented effects of armed conflict on children.[6] As for the subsequent reports in the years to come, the office of the Special Representative raised awareness of the situation of children in armed conflict around the world. For example, in the 2006 report, the Special Representative stated that at that time over 2 million children had been killed in armed conflicts around the world, 6 million had become permanently disabled as a result of an armed conflict and more than 250,000 continued to be victims of child recruitment in armed conflicts around the world. To date, little has changed. The 2012 UN Report of the Secretary General on Children and Armed Conflict denounced that 32 "*persistent perpetrators*", that is, parties that have been listed for grave violations against children for five years or more, continued to commit crimes against children. Of these "*persistent per-*

2 No Peace without Justice, *International Criminal Justice and Children* (UNICEF Innocenti Research Centre, September 2002) 29.

3 UNGA, *Impact of Armed Conflict on Children: Note by the Secretary-General* (26 August 1996) A/51/306, para. 24.

4 Jeny Kuper, 'Children and Armed Conflict: Some Issues of Law and Policy', in: D. Fottrell (ed.) *Revisiting Children's Rights: Convention on the Rights of the Child* (Kluwer Law International 2000) 104-105.

5 UNGA, *Protection of Children Affected by Armed Conflicts: Resolution adopted by the General Assembly* (20 December 1993) A/RES/48/157. See also: Matthew Happold '*Child Soldiers in International Law*' (Manchester 2005) 36-42; Sara Dillon '*International Children's Rights*' (Carolina Academic Press 2010) 694-708; Magali Maystre '*Les Enfants Soldats en Droit International: Problématiques Contemporaines au Regard du Droit International Humanitaire et du Droit International Pénal*' (Perspectives Internationales No 30, 2010) 87-89.

6 UNGA, *Impact of Armed Conflict on Children: Note by the Secretary-General* (26 August 1996) A/51/306, para. 24.

petrators" seven are government security forces.[7] Regrettably, in spite of the growing awareness of the international community of these crimes, children continue to be targets of modern armed conflict and are often caught between being civilian victims but also participants in hostilities.[8]

Children in situations of armed conflict also suffer from sexual violence in a manner that is both unprecedented and not incidental. Sexual violence against children has become a weapon of war used to terrorise the population and force civilians to flee.[9] Children are increasingly at risk of becoming victims of sexual violence from all armed groups in a conflict, including even peacekeepers and humanitarian workers.[10] Even if sexual violence has devastating effects on all victims (adults or children, men, women, boys or girls) the impact of sexual violence on children is more profound and long-lasting, given the effects it has on their development.[11] The long-term effects of this kind of violence on children are both psychological and physical, including the sexual transmission of diseases such as HIV-AIDS and unwanted or forced pregnancies resulting thereof.[12]

The UN Commission on the Status of Women has denounced that though all children may be victims of sexual violence, girls, particularly adolescent girls, are at greater risk of suffering these crimes due to their age and vulnerability.[13] Although boys are also victims of sexual violence,[14] this crime affects girls disproportionately and it is estimated that around the world some half a million children are "born of war": resulting from rape, forced pregnancies and sexual slavery.[15] Thus in many cases, sexual violence committed against

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7 UNGA/Security Council, *Children and Armed Conflict: Report of the Secretary-General* (26 April 2012) A/66/782-S/2012/261, para. 221.

8 Jeny Kuper, 'Children and Armed Conflict: Some Issues of Law and Policy', in: D. Fottrell (ed.) *Revisiting Children's Rights: Convention on the Rights of the Child* (Kluwer Law International 2000) 109. See also: Geraldine Van Bueren, *The International Law on the Rights of the Child*. (Save the Children 1998) 329.

9 UNGA, *Impact of Armed Conflict on Children: Note by the Secretary-General* (26 August 1996) A/51/306, para. 94.

10 UN Commission on Human Rights, *Annual Report of the Special Representative of the Secretary-General for Children and Armed Conflict, Olara Otunnu* (28 January 2004) E/CN.4/2004/70, 7.

11 No Peace without Justice, *International Criminal Justice and Children* (UNICEF Innocenti Research Centre, September 2002) 79.

12 No Peace without Justice, *International Criminal Justice and Children* (UNICEF Innocenti Research Centre, September 2002) 77; Anne-Marie De Brouwer, 'Reparations of Victims of Sexual Violence: Possibilities at the ICC and at the Trust Fund for Victims and their Families' (2007) *Leiden Journal of International Law*, 207-237.

13 UN Commission on the Status of Women, *The Elimination of All Forms of Discrimination and Violence Against the Girl Child* (12 December 2006) E/CN.6/2007/2, paras 6 and 30.

14 No Peace without Justice, *International Criminal Justice and Children* (UNICEF Innocenti Research Centre, September 2002) 77.

15 UN Office of the High Commissioner for Human Rights, *Report of the Panel on Remedies and Reparations for Victims of Sexual Violence in the Democratic Republic of Congo to the High Commissioner for Human Rights* (March 2011) available at: <http://www.ohchr.org/Documents/Countries/ZR/DRC_Reparations_Report_en.pdf.> accessed 3 September 2013.

girls also has multiplying effects that surpass generations, affecting also children born as a result of these crimes.[16] These "second generation" children, as well as their young mothers, suffer rejection and ostracism.[17] In addition to the problems encountered by all children in armed conflict situations, these children suffer from additional stigma and discrimination, and are often deprived of fundamental rights such as nationality, family and identity.[18] Moreover, as noted by Hall-Martinez, the crime of forced pregnancy inflicts incomparable harm on the victims by occupying a woman's body and forcing her to bear her rapist's child.[19] If, in addition to this, the young age of the victim is added, forced impregnation could have devastating physical effects on her body, which might very well be unprepared to bear a child, and also shattering emotional effects on the victim, who may not have reached maturity and psychological development to become a parent. Furthermore, they may have particular health problems resulting from the sexual violence suffered by their mothers (*i.e.* HIV/AIDS) as well as psychological problems due to their mother's trauma.[20]

Violence committed against children in situations of armed conflict has long-lasting effects that taint the lives of child victims often in a permanent manner. In this regard, the CRC Committee in its General Comment on Violence Against Children, determined that there are multiple short and long-term health consequences to violence, all of which are applicable to situations of armed conflict in which children are often victims of extreme acts of violence. The CRC Committee mentioned physical health problems (including sexually transmitted diseases, diarrhoea and malnutrition); cognitive impairment (including impaired school and work performance); psychological and emotional consequences (such as feelings of rejection and abandonment, impaired attachment, trauma, fear, anxiety, insecurity and shattered self-esteem); mental health problems (such as anxiety and depressive disorders, hallucinations,

16 Geraldine Van Bueren, *The International Law on the Rights of the Child* (Save the Children 1998) 340-341.

17 UNGA, *Impact of Armed Conflict on Children: Note by the Secretary-General* (26 August 1996) A/51/306, para. 92.

18 In some cases, these children born of sexual violence are abandoned, and sometimes even killed. Many children also suffer from economic hardship, as they and their mothers are often rejected and may have no access to social benefits and education. See: Charlie Carpenter (coordinator), *Protecting Children Born of Sexual Violence and Exploitation in Conflict Zones: Existing Practice and Knowledge Gaps* (National Science Foundation, Ford Institute of Human Security and University of Pittsburgh, December 2004-March 2005) 4, 10.

19 Kathy Hall-Martinez and Barbara Bedont, 'Ending Impunity for Gender Crimes under the International Criminal Court' (1999) *The Brown Journal of World Affairs*, 65-86.

20 As noted by Denov, particularly referring to girls who had been victims of sexual violence in Sierra Leone, these crimes have a profound effect on the mind and body, and scars not only the body, but also the memory of the victim who may have a long-term sense of insecurity, whether physical, psychological or socio-economic in nature. See: Myriam Denov, *Wartime Sexual Violence in Sierra Leone* (Security Dialogue Vol 37 No 3, September 2006) 327.

memory disturbances and suicide attempts); and health-risk behaviours (such as substance abuse and early initiation of sexual behaviour). Secondly the CRC Committee found that there are developmental and behavioural consequences (such as school non-attendance and aggressive, antisocial, self-destructive and interpersonal destructive behaviours) that can lead, *inter alia*, to deterioration of relationships, exclusion from school and coming into conflict with the law.[21]

All these consequences of armed conflict and violence against children, mounted with the fact that some armed conflicts last for several decades, often lead to what has been called "second generation" wars, with children who have lived their entire lives in a situation of armed conflict and violence, and see it as a permanent way of life.[22]

This situation of children must not be ignored by the ICC, particularly when responding to the child victims or witnesses' needs pursuant to Rule 86 of the RPE. Moreover, these effects of violence against children should also be considered when children become means of proof in judicial proceedings, in which the rights of the accused to a fair trial must be balanced with the duty to protect these children.

1.2.2 Socioeconomic impact of armed conflict on children

Armed conflict also has particular socioeconomic effects on children, as it often results in damage or destruction of a society's social and cultural life (*i.e.* schools, health systems), leaving children deprived of their material and emotional needs.[23] During an armed conflict the educational infrastructure is severely affected, and children may lose years of schooling that will affect their future development into productive and economically independent individuals.[24] Furthermore, when adult family members are killed or displaced, children may end up assuming leadership roles in communities and families: girls become "mothers" for younger siblings and boys "fathers", both heads of families.[25] All of this deprives children of fundamental rights according to the CRC: mainly their right to education and their right to rest and leisure. Likewise, after an armed conflict, many child-headed households may often lack legal and social protection, and may not be entitled to land, property

21 CRC Committee, *General comment No. 13 (2011): The right of the child to freedom from all forms of violence* (18 April 2011) CRC/C/GC/13, para. 14.

22 Peter Warren Singer, *Children at War* (New York, Pantheon Books, 2005) 43.

23 UNGA, *Impact of Armed Conflict on Children: Note by the Secretary-General* (26 August 1996) A/51/306, para. 29.

24 UNGA, *Impact of Armed Conflict on Children: Note by the Secretary-General* (26 August 1996) A/51/306, para. 187.

25 Coalition for the International Criminal Court (CICC) *Child Victims of Genocide, War Crimes and Crimes Against Humanity* <http://www.iccnow.org/documents/children_&_the_ICC.pdf> accessed 7 August 2013.

and inheritance rights under national law, which leaves children in a situation of extreme vulnerability.[26]

Under such economic and social conditions, children's recruitment often occurs either "voluntarily" or compulsorily. As will be further analysed in Chapter 4 of this research, due to these socioeconomic burdens, children's recruitment is rarely, if not impossible, voluntarily, as they may join the armed conflict in order to protect themselves and their families, out of vengeance for harms suffered by family or community members, or in order to ensure their daily subsistence.[27] At the same time, children recruited in armed groups often lose their social and family ties, and may become addicted to drugs, all of which makes their future reintegration into society and economic life complicated.[28]

The economic and social hardships suffered by children, particularly girls, also make them extremely vulnerable to sexual exploitation and prostitution.[29] As noted above, girls that have suffered from crimes of sexual violence are often rejected by their families, are not able to marry, and suffer from negative long-term socioeconomic effects that may impede their future development and growth both in the family and community spheres.

Though thousands of children die as a direct result of armed conflict, many others die of diseases related to this state of violence, such as malnutrition and infectious diseases, diarrheic illnesses, and respiratory infections, all of which often occur as a result of displacement and the lack of basic health and sanitary services. During armed conflict, health services and food supplies are interrupted, leaving many children adrift. Armed conflict also affects children who suffer from war-related disabilities (both physical and mental). According to the World Health Organisation, armed conflict is the leading cause of disabilities in children.[30] These hardships are worsened when economic sanctions are put into place. Even though humanitarian aid is exempt from sanctions, the distribution of food, medicines and the proper working of sanitation and health systems are often affected when sanctions are put in place, affecting mostly women and children.[31]

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26 UNGA, *Impact of Armed Conflict on Children: Note by the Secretary-General* (26 August 1996) A/51/306, para. 89. See also: Charlotte Phillips, *Child-headed Households: a Feasible Way Forward, or an Infringement of Children's Right to Alternative Care?* (Leiden University 2011).

27 No Peace without Justice, *International Criminal Justice and Children* (UNICEF Innocenti Research Centre, September 2002) 74. See also: Matthew Happold, *Child Soldiers in International Law* (Manchester 2005) 11-15.

28 UNGA, *Report of the Special Representative of the Secretary-General for Children and Armed Conflict* (17 August 2006) A/61/275 para. 12.

29 UNGA, *Impact of Armed Conflict on Children: Note by the Secretary-General* (26 August 1996) A/51/306, para. 96.

30 UNGA, *Impact of Armed Conflict on Children: Note by the Secretary-General* (26 August 1996) A/51/306, para. 145.

31 UNGA, *Impact of Armed Conflict on Children: Note by the Secretary-General* (26 August 1996) A/51/306, paras 128-129.

1.2.3 Refugee and internally displaced children

In the early 1980's there were 5.7 million refugees worldwide and by the end of that decade, the number rose to 14.8 million. In 2006, the number of refugees rose to up to 20.8 million persons worldwide and an estimated 23.7 million persons were internally displaced around the world.[32] Among the millions of refugees and internally displaced persons around the world, it is estimated that 80 per cent are women and children, and at least 50 per cent of them are children.[33]

Children are often the first victims of massive displacements, as they are more vulnerable to diseases such as diarrhoea, malnutrition, and respiratory infections, all of which increase in situations of overcrowding, lack of food and poor sanitation.[34] Additionally, children who are displaced are at a greater risk of being victims of crimes, such as sexual violence and recruitment, due to insecurity and lack of economic and educational opportunities for children in those camps.[35]

The general breakdown of all social structures due to massive displacement of people often entails that States and the community are not in a position to provide the necessary protection for children without families.[36] Even when children are under the care of both parents, they have little potential to provide protection and act as role models for their children due to the loss of their normal livelihoods.[37] Some children, those that are unaccompanied and thus separated from any adult relative,[38] are at greater risk, since under many legal systems they will lack legal capacity to access asylum procedures and other forms of complementary protection. Moreover, children who have been displaced and lose contact with their family members also suffer psychologically as they have been separated from the people most important to them, and often under brutal circumstances.[39]

For many children their refugee status is also complicated by the fact that they could have committed international crimes, particularly as a result of

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32 United Nations High Commission on Refugees (UNHCR), *Refugees by Numbers* (2006) 19.

33 UNGA, *Impact of Armed Conflict on Children: Note by the Secretary-General* (26 August 1996) A/51/306, paras 26 and 66.

34 UNGA, *Impact of Armed Conflict on Children: Note by the Secretary-General* (26 August 1996) A/51/306, para. 79.

35 UN Children's Fund (UNICEF), *The Paris Principles: Principles and Guidelines on Children Associated With Armed Forces or Armed Groups* (February 2007), Principle 5.0.

36 International Committee of the Red Cross (ICRC), *Inter-Agency Guiding Principles for Unaccompanied and Separated Children* (January 2004) 2.

37 UNHCR, *Refugee Children: Guidelines on Protection and Care* (Geneva 1994) 10.

38 ICRC, *Inter-Agency Guiding Principles for Unaccompanied and Separated Children* (January 2004) 7. See also: Geraldine Van Bueren, *The International Law on the Rights of the Child*.(Save the Children 1998) 342-344.

39 Geraldine Van Bueren, *The International Law on the Rights of the Child*.(Save the Children 1998) 26.

their voluntary or forced recruitment into armed groups. In accordance with Article 1(F) of the Convention relating to the Status of Refugees (Refugee Convention) none of its provisions shall apply to any person for whom there are serious reasons to consider that he or she has committed an international crime.[40] In light of this provision, many children could be excluded from the safeguards provided for in the Refugee Convention based on their participation in armed conflict. Davison has commented that if it can be discerned that the child has been forcibly recruited, refugee status could be granted to the child, albeit any crime he or she could have committed during the recruitment.[41] However, it could also be argued that such an exemption would be contrary to the object and purpose of the Refugee Convention, which by no means provides children this "immunity". This dilemma does reveal a need to modify the Refugee Convention in response of the changing nature of armed conflicts since 1951 when this international treaty was adopted.

1.3 Children as Participants in Armed Conflict

In over three-fourths of the conflicts around the world, children participate as combatants,[42] and are recruited and used in hostilities in at least 86 countries or territories worldwide.[43]

But what exactly encompasses children's participation in armed conflict? The Rome Statute does not give a very clear definition of this concept, only making reference to the crimes of conscription, enlistment and use of children to actively participate in hostilities, without any further detail on what really is meant by "active participation". The definition of these crimes will be analysed in-depth in Chapter 4. However, it is important to mention already the definition given by the Paris Principles and Guidelines on Children Associated with Armed Groups or Forces (Paris Principles),[44] which is a political document signed by 76 States that provides guidelines on the disarmament, demobilization and reintegration of children associated with armed groups. Although the terms of the Paris Principles may be too broad a definition in order to decide on the individual criminal responsibility of perpetrators of crimes of child recruitment, they do offer a wider concept that adjusts to the realities of today's armed conflicts, in which children participate in countless

40 *Convention Relating to the Status of Refugees*, 28 July 1951, UN Treaty Series, vol. 189, p. 137.
41 Ann Davison, 'Child Soldiers: No Longer a Minor Incident' (2004) *Willamette Journal of International Law and Dispute Resolution,* 152. See also: Magali Maystre, *Les Enfants Soldats en Droit International: Problématiques Contemporaines au Regard du Droit International Humanitaire et du Droit International Pénal* (Perspectives Internationales No 30 2010) 22.
42 Peter Warren Singer, *Children at War* (New York, Pantheon Books, 2005) 7.
43 Mark Drumbl, *Reimagining Child Soldiers in International Law and Policy* (Oxford University Press 2012) 5.
44 Paris Principles.

roles, from fighting in battles to serving as cooks or domestic servants in commanders' quarters.

According to the Paris Principles (which will be further analysed in Chapters 3 and 4 of this research), a "child associated with an armed force or armed group" is:

> '(…) any person under 18 years of age who is or who has been recruited or used by an armed force or armed group in any capacity, including but not limited to children, boys and girls, used as fighters, cooks, porters, messengers, spies or for sexual purposes.'

It does not only refer to a child who is taking or has taken a direct part in hostilities.[45]

Armed groups and forces recruit children; they are either conscripted (recruited by force) or enlisted (recruited voluntarily). As noted above, some experts believe that since several forces including cultural, social, economic or political pressures, drive children to "voluntarily" enlist, all child recruitment should be considered involuntary.[46] However, other scholars have stated that children should not be regarded as "incompetent" individuals that have no will and that children's participation in armed conflict is a coping strategy that serves a protective psychological function compared to an alternative of frustration, poverty, hopelessness and learnt hopelessness.[47] Although the "voluntariness" will be analysed further in Chapter 4, it is necessary to determine at this juncture that, regardless of the nature of the recruitment (either by force of voluntarily), the child's involvement with an armed group has distressing consequences for the child, his or her family and ultimately his or her community. Furthermore, as will be analysed further in Chapter 4, both conscription and enlistment are prohibited by the Rome Statute and consequently, consent should thus not serve as a defence.

But why are children recruited in current armed conflicts? Singer identifies three main causes to this new warfare trend: a) social disruptions and failure in development; b) technological improvement in production of lighter and easier to use weapons; and c) the rise in brutality.[48] This author is of the view that poverty, protection and revenge are some of the most common underlying

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45 Paris Principles, principle 2.1.

46 UNGA, *Impact of Armed Conflict on Children: Note by the Secretary-General* (26 August 1996) A/51/306, para. 38.

47 Angela Veale, 'The Criminal Responsibility of Former Child Soldiers: Contributions from Psychology' in Karin Arts and Vesselin Popovski (eds.), *International Criminal Accountability and the Rights of Children* (The Hague Academic Coalition 2006) 99. See also: Magali Maystre '*Les Enfants Soldats en Droit International: Problématiques Contemporaines au Regard du Droit International Humanitaire et du Droit International Pénal*' (Perspectives Internationales No 30 2010) 27-28.

48 Peter Warren Singer, *Children at War* (New York, Pantheon Books, 2005) 38. See also: Matthew Happold, *Child Soldiers in International Law* (Manchester 2005) 8-11.

causes of the "voluntary" recruitment of children.[49] Furthermore, Singer also states that modern small weapons are much easier and lighter to use due to new technologies and lighter materials used in modern weaponry. Thus, a child can carry it effortlessly and can learn how to use it within minutes. These weapons have also become cheaper and widely available, which may explain why it is estimated that there are currently five hundred million small arms around the world: one for each twelve persons on the planet.[50]

Likewise, armed conflicts have become more brutal, and the use of children turns them into fearless fighters who may often be unaware of the effects of the crimes they commit. Along this view, the ICRC has affirmed that recruitment of children is not only a crime against children being recruited, but it also increases the crimes committed against the civilian population in general, as children who take part in hostilities not only place their own lives at risk, but also their immature and impulsive conduct endangers the lives of everyone around them.[51] As a result of this modern warfare trend, adults are no longer the main recruits in some armed conflicts, and children have become the primary source of fighters. As stated by the UN Secretary General in the 10th Annual Report on Children and Armed Conflict, the crime of child recruitment is "migrating" within regions, as rebellious groups move across borders in search for new child recruits and children are "recycled" from one conflict to another.[52]

In light of the above, any effort to demobilise and reintegrate child soldiers seems as a titanic task. According to the UN, demobilisation programmes aim to discharge active child combatants from armed forces or groups, whereas reintegration programmes are the processes by which ex-combatants acquire civilian status and gain sustainable employment and income.[53] In general, all demobilisation and reintegration programmes should take into account the particular needs of children, and should be organised separately into child-specific programmes.[54] For example, child demobilisation requires taking into consideration aspects such as: education, recreation, psychological treatment, reunification with their families, etc. However, implementation of these standards is often problematic. For example, incentives, such as the promise of money upon presentation of a weapon, which were implemented in some demobilisation programmes in the past, brought more negative effects than

49 Peter Warren Singer, *Children at War* (New York, Pantheon Books, 2005) 61-63.
50 Peter Warren Singer, *Children at War* (New York, Pantheon Books, 2005) 46-47.
51 ICRC, *Children in War* (July 2004) 2.
52 UNGA/Security Council, *Children and Armed Conflict: Report of the Secretary-General* (26 October 2006) A/61/529-A/2006/826 para. 4.
53 UN Disarmament, Demobilization and Reintegration Resource Centre, *What is DDR?* <http://www.unddr.org/whatisddr.php> accessed 31 August 2012 (webpage no longer available).
54 Geraldine Van Bueren '*The International Law on the Rights of the Child*' (Save the Children 1998) 348.

benefits to former child soldiers.[55] It also lead to discrimination against girls who formed part of the same armed groups.[56]

Another aspect of child recruitment that has its own particularities is that one committed against girls.[57] The reasons for which they join the armed groups, the potential for their release, and the effects of their experience on their physical, emotional and social well-being, and the long-term effects on their social reintegration are all too different from that of boy recruits.[58] Although these crimes committed against girls will be further analysed in Chapter 4, it is important to generally describe the manner in which girls are recruited by armed groups. For example, many girls are recruited to help armed groups in domestic chores, such as fetching water or preparing food. Also, girls are recruited as sexual slaves, and are often "married" to fighters in ceremonies. Girls face deep-rooted stigmas in their families and communities, along with traumas resulting from the abuses and harms they have suffered.[59] Moreover, many girls, though initially abducted and raped, later develop ties with their perpetrators, and create "family units" with them and the children resulting from rape.[60] In many cases, girls have to deal with residual relationships or feelings for their captors, who are perpetrators of serious crimes, but also their "husband" and often father of their children.[61]

What is most paradoxical as regards children associated with armed conflict is the fact that although victims for some, they are ultimately also perpetrators of crimes just as serious and grave as those committed against them. Although pursuant to Article 26 of the Rome Statute, the ICC may not prosecute children, this does not mean that child perpetrators of crimes should remain absolved of any criminal or at least moral responsibility.[62]

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55 UNGA/Security Council, *Children and Armed Conflict: Report of the Secretary-General* (9 February 2005) A/59/695-S/2005/72 paras 138-144.

56 UN Disarmament, Demobilization and Reintegration Resource Centre, *What is DDR?* <http://www.unddr.org/whatisddr.php> accessed 31 August 2012 (webpage no longer available).

57 UN Commission on the Status of Women, *The Elimination of All Forms of Discrimination and Violence Against the Girl Child* (12 December 2006) E/CN.6/2007/2, para. 30.

58 Paris Principles, principle 4.

59 UN Commission on the Status of Women, *The Elimination of All Forms of Discrimination and Violence Against the Girl Child* (12 December 2006) E/CN.6/2007/2, para. 32.

60 UN General Assembly, *Report of the Special Representative of the Secretary-General for Children and Armed Conflict* (17 August 2006) A/61/275, para. 13.

61 Paris Principles, principle 7.59.

62 Matthew Happold '*Child Soldiers in International Law*' (Manchester 2005)141-159; Christina Clark, 'Juvenile Justice and Child Soldiering: Trends, Challenges and Dilemmas', in: Charles Greenbaum and others (eds), *Protection of Children During Armed Political Conflict: A Multi-disciplinary Perspective* (Intersentia 2006) 311-328; Magali Maystre '*Les Enfants Soldats en Droit International: Problématiques Contemporaines au Regard du Droit International Humanitaire et du Droit International Pénal*' (Perspectives Internationales No 30 2010) 135-138.

Children who perpetrated serious crimes could be prosecuted under national juvenile criminal systems.[63] Where these systems have been established in accordance with international human rights standards (such as Article 40 of the CRC), bringing a child to justice could help achieve truth and reconciliation. As commented by Davison, in order to provide some sort of respite for the victims and the community and to favour children's reintegration into society, justice mechanisms should be put in place for child perpetrators.[64] However, juvenile criminal systems must take into account the child's age and promote his or her reintegration. It should also bear in mind the child's role in post-conflict reconstruction and reconciliation and provide for alternatives to imprisonment, such as foster care, education and vocational programmes that benefit the child's reintegration into society.[65]

However, it could be argued that children under the age of 15 should not be prosecuted by national criminal jurisdictions due to their inability to consent to their recruitment. In such instances, particularly when national jurisdictions are barred from prosecuting young children, other non-judicial justice mechanisms could be of significance not only for the child perpetrator of crimes, but also for their families and communities and ultimately their victims.[66] Although these mechanisms could help create a climate of justice and reconciliation, they should also be consistent with international human rights standards (such as the right to a fair trial) and should be used in a non-discriminatory manner (*i.e.* on grounds of sex, race, religion or ethnicity).[67]

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63 For an analysis on the drafting history of Article 26 of the Rome Statute, see: Mark Drumbl, *Reimagining Child Soldiers in International Law and Policy* (Oxford University Press 2012) 119-122.

64 Ann Davison, 'Child Soldiers: No Longer a Minor Incident' (2004) *Willamette Journal of International Law and Dispute Resolution,* 154.

65 See Mark Drumbl, *Reimagining Child Soldiers in International Law and Policy* (Oxford University Press 2012) 128-133.

66 Nienke Grossman, 'Rehabilitation or Revenge: Prosecuting Child Soldiers for Human Rights Violations', in: Sara Dillon (ed), *International Children's Rights* (Carolina Academic Press 2010) 729. See also: Amnesty International, *Child Soldiers: Criminals or Victims*? (2000) available at: <http://amnesty.org/en/library/asset/IOR50/002/2000/en/049a91ec-dc61-11dd-bce7-11be3666d687/ior500022000en.html> accessed 7 August 2013.

67 UN, Guidance Note of the Secretary General, UN Approach to Justice for Children (September 2008) 3. See for example the report of Human Rights Watch on the Gacaca courts in Rwanda, and how these were well below international standards, particular as regards fair trial. Human Rights Watch '*Justice Compromised, The Legacy of Rwanda's Community-Based Gacaca Courts'* (2011). See also: Institute for War and Peace Reporting '*Can Traditional Rituals Bring Justice to Northern Uganda?'* (2007). Available at <http://iwpr.net/report-news/can-traditional-rituals-bring-justice-northern-uganda> accessed 7 August 2013; Khristopher Carlson and Dyan Mazurana '*Accountability for Sexual and Gender-Based Crimes by the Lord's Resistance Army'* in Sharanjeet Parmar and others (ed) '*Children and Transitional Justice, Truth-Telling, Accountability and Reconciliation'* Harvard Law School Human Rights Program and UNICEF (2010) 236. These authors emphasise how women and girls are often excluded or given minimal participation in traditional justice mechanisms.

Most importantly, regardless of whether justice mechanisms are judicial or non-judicial, children associated with armed groups should not be marginalised from post-conflict peace and justice efforts. Former child soldiers are not only defenceless victims or evil children who committed heinous crimes. They are also children who may have developed important skills and leadership experience, placing them in a better position of confidence, self-reliance and maturity vis-à-vis others their age.[68] Hence, post-conflict justice mechanisms (either national or international, judicial or non-judicial) should take into account the identity transformation between the child and the community, resulting from the child's recruitment.[69] In this sense, even though the childhood of former child soldiers should not be denied, their experiences as members of an armed group must also be taken into consideration, as regrettably, though they could be children as regards their age, they could have reached a level of maturity uncommon for others their age as a result of their recruitment but also lack the innocence of childhood as a result of the crimes committed against them and the crimes they could have committed against others.[70]

1.4 Children as Key Players in Peace, Reconciliation and Justice Mechanisms

Armed conflict and violence have an impact on children that is likely to have long-term adverse consequences for the formation of children's values, identity, political beliefs and ability to function as leaders and decision makers in the future.[71] This affirmation may be applicable to many children living in situations of armed conflict, but also of massive human rights violations, and particularly in situations where international criminal within the ICC's jurisdiction are committed. In the case of child soldiers, but also as regards other children affected by crimes within the ICC's jurisdiction, reintegration, peace and reconciliation mechanisms, including international justice, should be processes towards civil life in peace. Within these processes, children should have meaningful roles and children's access to education, family unity, dig-

68 Angela Veale, 'The Criminal Responsibility of Former Child Soldiers: Contributions from Psychology' in Karin Arts and Vesselin Popovski (eds), *International Criminal Accountability and the Rights of Children* (The Hague Academic Coalition 2006) 100. See also Mark Drumbl, *Reimagining Child Soldiers in International Law and Policy* (Oxford University Press 2012) 53-58.

69 Angela Veale, 'The Criminal Responsibility of Former Child Soldiers: Contributions from Psychology' in Karin Arts and Vesselin Popovski (eds), *International Criminal Accountability and the Rights of Children* (The Hague Academic Coalition 2006) 105.

70 See Mark Drumbl, *Reimagining Child Soldiers in International Law and Policy* (Oxford University Press 2012) 79-80.

71 No Peace without Justice, *International Criminal Justice and Children* (UNICEF Innocenti Research Centre, September 2002) 3.

nified livelihoods and safety from damage should be protected.[72] All children, including those who were not involved in hostilities, need to be involved in the reconciliation process so that they can become adults that will contribute to the peace-making efforts.

Although the ICC proceedings cannot address all the needs of children or any part of the civilian population in post-conflict situations, ICC proceedings should endeavour to act jointly with the peace and reconciliation process or at least, cause no harm to the civilians who may be attempting to regain civilian life in peace. As regards children in particular, although the ICC should protect them as witnesses and victims pursuant to Article 68 of the Rome Statute, it should also allow children to participate in the international justice arena, while safeguarding their well-being and security and the rights of fair trial.[73] As will be analysed further in Chapter 5 of this research, when children give their voluntary consent, either individually or through their parent or legal guardian, they can participate in justice mechanisms. Most importantly, as will be further observed, allowing children to participate either as victims or witnesses in ICC proceedings could prevent having testimonies based only on the adult perception and perspective of the experiences lived by civilians during an armed conflict.[74]

For example, in the South African Truth and Reconciliation Commission, children under 18 could not give testimony, but were able to participate in special hearings for children and youth.[75] In the Sierra Leone Truth and Reconciliation Commission a child-friendly report was created, which includes pictures made by children and a text suitable to read at elementary school level. Other initiatives include the establishment of youth-to-youth networks, in which children can work on issues of children and armed conflict, or "Voice of Children", a radio programme created in Sierra Leone so that children could participate in the peace-making process.[76] Although these examples may not be applicable to the, in essence, ICC criminal proceedings, such ventures could become part of the reparations proceedings foreseen in the Rome Statute.[77]

72 Paris Principles, 7.
73 Statement by Thoraya Ahmed Obaid, Executive Director, United Nations Population Fund, One Young Woman, Making a Richer World, International Youth Day, 12 August 2007.
74 Paris Principles, 9.
75 Truth and Reconciliation Commission of South Africa (TRC), *TRC Report* (29 October 1998) Vol 4, Ch 9.
76 UN Commission on Human Rights, *Rights of the Child: Annual report of the Special Representative of the Secretary-General for Children and Armed Conflict, Mr Olara A. Otunnu* (3 March 2003) E/CN.4/2003/77, 7.
77 UNGA, *Impact of Armed Conflict on Children: Note by the Secretary-General* (26 August 1996) A/51/306, para. 242.

1.5 CONCLUSIONS

Child victims and witnesses appearing before the ICC should not only be regarded as vulnerable individuals that require protection pursuant to Article 68 of the Rome Statute. Although this may be the case in many cases involving children, the ICC should also take into consideration that child witnesses and victims who have experienced international crimes may have developed great resilience and could have also perpetrated crimes themselves. Regrettably, these children's moral values could also have been affected by early exposure to violence and separation from their parents and their communities. This complex reality must be taken into account throughout the judicial process, which should not label children solely as "vulnerable" individuals. As will be analysed further in Chapter 5, a former child soldier witness may need to be reassured that he or she will not be prosecuted in his or her own country for crimes he or she will testify about in ICC proceedings (*i.e.* by ordering that all of his/her testimony remains confidential pursuant to Rule 74 of the RPE). A former child soldier or any child exposed to extreme levels of violence may also need further preparation before his or her testimony, particularly to understand the notion of telling the truth and taking an oath, but also to gain trust and confidence in all the adults involved in the ICC proceedings (judges, prosecutors, counsel).

2 Children and ICC's structure

This Chapter introduces the different organs of the Court and their role in the interaction of children with the ICC. It is aimed to those readers that may not be familiar with the ICC structure and its main distinctions with other international tribunals and courts. Although for the more knowledgeable reader the following Chapter may seem obvious at a first glance, it is still of significance, as it analyses the ICC structure and proceedings from the perspective of child victims and witnesses. It proposes how each organ of the ICC has responsibilities in order to guarantee the protection and participation of child victims and witnesses pursuant to Article 68 of the Rome Statute and address the harms suffered by children through reparations in accordance with Article 75 of the Rome Statute.

The present Chapter introduces the ICC, its history and its current structure.[1] In the first section on the establishment of the ICC, it will show how children's rights and a child-centred perspective were discussed and implemented in the adoption of the Rome Statute. The discussions of the Rome Conference and other preparatory meetings may be important when interpreting ICC provisions, as ICC judges have repeatedly referred to the drafting history of provisions in their decisions.[2]

Moreover, section two gives a general introduction to the structure of the ICC, which has developed into a complex organisation, with seat in The Hague, but also with field offices in the different African countries were the ICC is

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1 This chapter very generally synthesises the main aspects of the ICC's establishment and structure from a children's rights perspective. However, for further in-depth analysis on the general establishment and structure of the ICC, the reader is referred to the following literature: Otto Triffterer (ed), *Commentary on the Rome Statute of the ICC: Observers' Notes, Article by Article* (2nd Edn, Nomos Verlagsgesellschaft 2008) 15-127 and 931-1063; William Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (Oxford University Press 2010) 1-27; Cherif Bassiouni, *The Legislative History of the International Criminal Court: Introduction, Analysis and Integrated Text* (Transnational Publishers 2005) Volumes 1, 2, and 3; Roberto Belleli (ed), *International Criminal Justice, Law and Practice from the Rome Statute to its Review* (Ashgate 2010), 5-66.

2 For example, in its decision confirming the charges against Thomas Lubanga Dyilo, Pre-Trial Chamber I referred to the "Zutphen Draft", which was a discussion paper adopted in a PrepCom. See *Lubanga case* 'Decision on the confirmation of charges' (29 January 2007) ICC-01/04-01/06-803-tEN para. 267. See also *Kenya Situation*, 'Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya' (31 March 2010) ICC-01/09-19-Corr, paras 17-19.

currently investigating and prosecuting cases. The Chapter focuses on how the different organs of the ICC may play a role in the protection of child victims and witnesses and particularly, in ensuring the ICC's mandate under Article 68 of the Rome Statute and Rule 86 of the RPE.

2.1 THE ESTABLISHMENT OF THE ICC

In 1995, the UNGA established an ad-hoc committee for the establishment of a permanent international criminal court. This ad-hoc committee, which later was called the Preparatory Commission (PrepCom), prepared a draft statute, which finally was discussed and adopted in 1998, in the Plenipotentiaries Conference convened by the UNGA in Rome, Italy.[3]

At the outset of the process, different organs of the UN that monitor and protect children's rights actively participated in the process for the creation of the ICC. For example, in 1998, the CRC Committee rendered a recommendation to the PrepCom on this matter. On this occasion the CRC Committee urged the PrepCom to consider the following when drafting the Rome Statute for the ICC: a) definition of war crimes; b) age of criminal responsibility; c) aggravating and mitigating circumstances of crimes; and d) protection of the rights of the child. Most importantly, the CRC Committee stated that "the provisions of the Rome Statute of the ICC (must) be in line with the principles and provisions of the CRC with respect to the various aspects of the protection of children's rights".[4]

During the drafting process, as well as during the discussions that took place in the Rome Conference, civil society played an important role that unquestionably influenced the final version of the Rome Statute. Through the NGO Coalition for an International Criminal Court (CICC), among other civil society groups, more than eight hundred non-governmental organisations (NGOs) from all corners of the world came to Rome, including women's groups, disabilities organisations, religious groups, and children's rights groups, among many others. Among the list of NGOs that participated in the Rome Conference, some children-specific organisations were: Children's Fund of Canada, Save the Children Fund, Union to Protect the Children of Lebanon, and Youth Approach for Development and Cooperation.[5]

The influence of civil society in the drafting of the Rome Statute is reflected in the Rome Statute's many provisions that include *inter alia* gender perspect-

3 UNGA, *Establishment of an International Criminal Court: Resolution adopted by the General Assembly* (28 January 1998) A/RES/52/160.

4 UNGA, *Recommendation adopted by the CRC Committee* (2 April 1998) A/AC.249/1998/L.18.

5 UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, *Non-Governmental Organisations Accredited to Participate in the Conference* (5 June 1998) A/CONF.183/INF/3.

ive, protective measures for victims of sexual violence, and special measures for child victims. Undoubtedly, the ICC's present system, which provides for the participation of victims in the proceedings, as well as for reparations for the crimes they suffered, are a consequence of the participation of civil society groups in the adoption of the Rome Statute.

After five weeks of intensive discussions, amongst more than two thousand delegates from around the world, the Rome Statute was adopted on July 17th, 1998, with 120 votes in favour, 7 against and 2 abstentions.

Unlike the ad-hoc tribunals, which derive from the mandate of the United Nations Security Council (UNSC), the ICC originates from the UNGA. This explains the democratic values of this international organisation, which endeavours to have equitable geographical representation and gender balance in its human resources, from judges to general staff. Likewise, this egalitarian nature is reflected in the diversity of its provisions, which include procedural institutions both of common law and civil law systems.

Participation of children's NGOs and UN agencies, such as UNICEF, in the Rome Conference is reflected in provisions such as Article 26 of the Rome Statute that excludes criminal responsibility for children under 18, or Articles 36(8)(b) and 42(9), which call for expertise in violence against children among judges, and the Office of the Prosecutor (OTP). Likewise, the inclusion of child-specific crimes, such as forcible transfer of children (Article 6(e)), war crimes for intentionally attacking a school (Articles 8(2)(b)(ix) and 8(2)(e)(iv)), and conscripting, enlisting or using children under 15 to actively participate in hostilities (Article 8(2)(b)(xxvi) and 8(2)(e)(vii)) are unquestionably the result of the efforts made by children's rights organisations in the preparatory discussions prior to the adoption of the Rome Statute. Already in the Rome Conference UNICEF called upon States to use the CRC as "guiding reference and framework for the work of the (International) Criminal Court whenever the situation of children is at stake". It also affirmed that the CRC should inform the drafting process of the Rome Statute, considering the "virtual universal ratification" of the CRC and the consensus built around it.[6]

The efforts to include children's rights in the ICC went beyond Rome, with the drafting and adoption of the RPE and the Elements of Crimes. For example, in 1999, the PrepCom held a "Seminar on victims' access to the ICC",[7] with the participation of sixty experts from different parts of the world that spoke on a personal basis and made recommendations on how to include effective victims' rights in the ICC's RPE. In this Seminar important discussions took place

6 *UNICEF and the Establishment of the International Criminal Court*, 17 March 1998, ICC Preparatory Works, available at < http://www.legal-tools.org/en/doc/f0fa26/ > (accessed 7 August 2013) pp. 1-2.

7 UN Preparatory Commission for the International Criminal Court (PrepCom) *Report on the International Seminar on Victims' Access to the ICC* (6 July 1999) PCNICC/1999/WGRPE/INF/2.

that resulted, for example, in the Rules related to Victims and Witnesses Unit (VWU), which should have staff with expertise amongst others, in traumatised children.

In 2000, another seminar was held by the PrepCom to discuss protection of victims, in particular of special groups of victims, such as children and disabled persons. In its report, the PrepCom brought to the attention of State Parties to the Rome Statute the importance of: a) adopting special techniques to preserve the credibility and to protect a child witness; b) training investigation personnel in order to avoid re-traumatisation of child witnesses; and c) putting in place alternative means to obtain and admit children's evidence (*i.e.* video testimony).[8]

Clearly, as a result of these and many other discussions, children's rights are protected in various provisions of the Rome Statute and the RPE. For example, Rules 16 to 19 of the RPE regulate the functioning of the VWU and include many of the recommendations made by the PrepComs, such as the expertise in violence against children (Rule 19(f)), and the possibility to assign a child-support person to assist a child witness or victim through all stages of the proceedings (Rule 17(3)).

Ten years after the establishment of the ICC the participation of NGOs in the work of the ICC continues. As the OTP has stated, NGOs continue "to form a vital part of the Office's comprehensive strategy and fulfil various complementary roles within the scope of the ICC". For example, up until June 2006, the OTP had contact with over 300 NGOs.[9] For example, in June 2003, three months after being sworn in, the Prosecutor had a first public hearing with State Parties, NGOs and academics in which he presented the OTP's policy. The prosecution later included all comments made into a "Paper on Some Policy Issues before the OTP".[10] Likewise, NGOs continue to offer continuous support to the ICC but also monitor its work. For example, in preparation for the 2011 election of six new judges, a panel of experts made recommendations regarding the qualifications of the candidates.[11] It is to be noted that none of the candidates deemed unqualified by the panel were elected by the ASP.

NGOs also play a fundamental role in the field. For example, in the first Situation referred to the ICC, namely Uganda, both the OTP and the Registry

8 PrepCom, *Report of the Seminar of the Preparatory Commission for the ICC, Intersessional meeting, Istituto Superiore Internazionale di Scienze Criminali* (ISISC), January 31 – February 5, 2000.

9 ICC Office of the Prosecutor, *Report on the activities performed during the first three years (June 2003-June 2006)* (12 September 2006) para. 93 < http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/policies%20and%20strategies/Pages/report%20on%20the%20activities%20performed%20during%20the%20first%20three%20years%20%20june%202003%20%20%20june%202006.aspx > accessed 7 August 2013.

10 ICC Office of the Prosecutor, *Report on the activities performed during the first three years (June 2003-June 2006)* (12 September 2006), para. 57.

11 *Independent Panel on International Criminal Court Judicial Elections* <http://iccindependentpanel.org/> accessed 7 August 2013.

held workshops with traditional leaders (150 leaders, 120 NGOs, 60 local government representatives and 50 religious leaders) in order to analyse the relationship between the ICC and the peace process in this country.[12] Likewise, the Director of the TFV held consultations with local and religious leaders, and representatives of victims organisations in the Democratic Republic of Congo (DRC) and Uganda, in order to make an "initial assessment of the assistance being provided to victims" and explain to key stakeholders in both countries the "foundations for funding of the first projects" of the TFV.[13]

Although the ICC has become a strong organisation in its first ten years of existence, it still requires the assistance and cooperation of NGOs. Although, as will be analysed in Chapter 5, the involvement of intermediaries, often members of NGOs, could have affected the fairness of proceedings in the first cases before the ICC, the ICC cannot work isolated from local and international NGOs involved in the countries where the ICC is currently involved. The involvement of NGOs during the entirety of ICC proceedings, from the initial stages of Article 15 authorisation to commence an investigation, to the final phase of reparations, is incontestable. However, this association of the ICC with NGOs must be organised, duly regulated, and most importantly, kept under careful judicial scrutiny. Beyond the effectiveness of proceedings, the number of convictions or the number of participating victims, ICC judges should remain vigilant in order to guarantee that NGOs that assist the ICC, for example, in investigations, in the victims' application process and in the reparations proceedings, are also knowledgeable and respectful of the ICC provisions, particularly the safety and well-being of victims and witnesses pursuant to Article 68 of the Rome Statute, but also of the rights of the accused to a fair trial, as enshrined in Article 67 of the Rome Statute.

12 ICC Office of the Prosecutor, *Report on the activities performed during the first three years (June 2003-June 2006)* (12 September 2006) para. 34.

13 ICC Press and Media, 'Director of the Trust Fund met with victims' communities in Uganda' (Press release 13 June 2007) < http://www.icc-cpi.int/fr_menus/icc/structure%20of%20the%20court/outreach/uganda/press%20releases/Pages/director%20of%20the%20trust%20fund%20met%20with%20victims'%20communities%20in%20uganda.aspx > accessed 7 August 2013; 'Première visite du Directeur exécutif du Fonds au Profit des victimes en RDC' (Press release 15 June 2007) < http://www.icc-cpi.int/fr_menus/icc/press%20and%20media/press%20releases/2007/Pages/première%20visite%20du%20directeur%20exécutif%20du%20fonds%20au%20profit%20des%20victimes%20en%20rdc.aspx > accessed 7 August 2013.

2.2 ORGANISATION OF THE ICC

2.2.1 The Assembly of State Parties

The deliberative organ of the ICC is the ASP. This democratic organ makes many of the fundamental decisions for the functioning of the ICC, including any amendment to the Rome Statute and the RPE and approval of the ICC's annual budget. For example, in 2010, the ASP adopted a definition for the crime of aggression in the Review Conference held in that year.[14]

The ASP also elects ICC judges, as well as the Prosecutor and Deputy Prosecutors, and the Board of Directors of the TFV, all of which are nominated by the State Parties. In reference to the above, the ASP has repeatedly reminded State Parties to "take into account the need to include judges with legal expertise on specific issues, including, but not limited too, violence against women and children".[15] The ASP has also reminded the ICC of its obligation to recruit staff seeking expertise on issues such as violence against women and children.[16]

Since the ASP is the organ of the ICC that approves the yearly budget, it also provides management oversight to ICC organs. In this sense, the Presidency, Registry and the OTP yearly submit to the ASP their staffing and resources requirements. Consequently, the decisions of the ASP are fundamental in allocating resources and staff to the different sections of the ICC so they can meet their obligations as regards the protection of child victims and witnesses pursuant to the Rome Statute. Moreover, as will be analysed in Chapter 5 of this research, the ASP could amend the RPE in order to make participation for victims, particularly the application procedure, more collective and less burdensome for the victims, but ultimately for the accused persons who have the right to challenge such participation.

Another important aspect of the ASP, as an organ composed of all State Parties to the Rome Statute, is the necessary cooperation that must exist between the ICC and State Parties (*i.e.* for enforcement of sentences, relocation of witnesses, facilitating testimonies of witnesses, etc.).

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14 On 11 June 2010 the ASP included Article 8*bis* to the Rome Statute, which defines the crime of aggression. This amendment was inserted by: ICC Review Conference Resolution, *The Crime of Aggression* (11 June 2010) RC/Res.6.

15 ICC Assembly of States Parties, *Procedure for the Election of the Judges for the International Criminal Court* (Resolution of 9 September 2002) ICC-ASP/1/Res.3, para. 2.

16 ICC Assembly of States Parties, *Strengthening the International Criminal Court and the Assembly of States Parties* (Resolution of 1 December 2006) ICC-ASP/5/Res. 3, para. 21. See also *Strengthening the International Criminal Court and the Assembly of States Parties* (Resolution of 5 of December 2005) ICC-ASP/4/Res.4, para. 23.

2.2.2 Presidency and Chambers

The *Presidency* of the ICC has three main functions: external relations, administrative and judicial. Although the OTP may negotiate and conclude agreements on its own, the Presidency is the organ of the ICC that principally endorses cooperation agreements with State Parties, non-State Parties, as well as with international organisations and NGOs. Since the ICC does not have a police force to execute its warrants of arrest, or prison facilities for the enforcement of sentences, it depends on these agreements to fulfil its mandate.[17]

This mandate is paramount to protect children's rights before the ICC, as the Presidency could negotiate agreements with international organisations and/or NGOs with expertise in childrens' rights. For example, the Presidency adopted a "Negotiated Relationship Agreement between the ICC and the United Nations", in which it is established that the "United Nations or its programmes, funds and offices" may provide cooperation and assistance to the ICC.[18] Assistance and cooperation of UNICEF or other UN agencies or experts could prove essential for the ICC's work.[19] In fact, as will be studied further in Chapter 5, the Special Representative of the Secretary-General for Children and Armed Conflict acted as *amicus curiae* and later as expert witness in the ICC's first trial. Cooperation with other organisations, such as the African Union and other international organs specialised in children's rights, is also important (*i.e.* the African Committee of Experts on the Rights and Welfare of the Child), particularly to gain support and outreach in the continent currently under the ICC's scrutiny.

The *Chambers* of the ICC consist of three Divisions to which judges have been assigned: the Pre-Trial Division, the Trial Division and the Appeals Division.

The *Pre-Trial Division* is composed of three Pre-Trial Chambers with three judges serving in each Chamber, although a single judge may exercise the functions of a Pre-Trial Chamber. The Pre-Trial Chamber monitors fairness of the proceedings from the initial investigation of a Situation by the Prosecutor to the confirmation of charges against a suspect.[20] Among its multiple functions, the Pre-Trial Chamber may authorise the Prosecutor, upon request,

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17 *ICC, Structure of the Court, Presidency* < http://www.icc-cpi.int/en_menus/icc/structure of the court/presidency/Pages/the presidency.aspx> accessed 7 August 2013.

18 ICC Assembly of States Parties and United Nations, *Negotiated Relationship Agreement between the International Criminal Court and the United Nations* (October 2004) ICC-ASP/3/Res.1, article 15.

19 See for example: *Children and Armed Conflict: International Standards for Action"* (April 2003) <http://www.unicef.org/emerg/files/HSNBook.pdf> accessed 7 August 2013.

20 See Hall 1133-1145 and Schabas and Shibahara 1171-1181 in: Otto Triffterer (ed), *Commentary on the Rome Statute of the ICC: Observers' Notes, Article by Article* (2nd Edn, Nomos Verlagsgesellschaft 2008).

to commence an investigation *proprio motu* and may review the Prosecutor's decisions not to investigate or not to prosecute.[21]

The powers of the Pre-Trial Chamber are also significant in relation to the preservation of evidence, especially when there is a unique investigative opportunity, in accordance with Article 56 of the Rome Statute, or when the Prosecutor needs to take investigative steps in the territory of a State Party, as provided for in Article 57 of the Rome Statute.[22] For example, in investigations involving child witnesses, these powers of the pre-trial judges allow the Prosecutor to take the statement of child witnesses in a timely manner for their future use in pre-trial or trial proceedings. This possibility could prove helpful to take a statement or testimony from child witnesses only once, during the investigation stage, thus avoiding multiple contacts of the child witness with the ICC.[23]

Likewise, the Pre-Trial Chamber may issue orders for the protection of victims and witnesses from an early stage of the proceedings. Such measures, as will be analysed further in Chapter 5, may not only serve to protect the well-being and security of a child witness, but may also preserve the probative value of his or her testimony in trial, preserving its integrity, reliability and trustworthiness. Moreover, the Pre-Trial Chamber may decide on the participation of victims during this initial stage.[24]

In the *Trial Division*, judges are assigned to Trial Chambers of three judges each. Unlike the Pre-Trial Chamber's functions, which may be exercised by a single judge, the functions of the Trial Chamber must be carried mostly by the three judges of the said Chamber.[25] However, recently Rule 132 *bis* was adopted, allowing for a Single Judge to act alone for the preparation of trial.[26]

During the trial proceedings the Trial Chamber hears the evidence and submissions of parties and participants. Additionally, according to Article 69(3) of the Rome Statute, the Trial Chamber may request the submission of evidence

21 *ICC, Structure of the Court, Chambers, Trial Division* < http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/chambers/trial%20division/Pages/trial%20division.aspx > accessed 7 August 2013. See also Guariglia and Hochmayr in Otto Triffterer (ed), *Commentary on the Rome Statute of the ICC: Observers' Notes, Article by Article* (2nd Edn, Nomos Verlagsgesellschaft 2008) 1117-1131.

22 See Guariglia and Hochmayr in Otto Triffterer (ed), *Commentary on the Rome Statute of the ICC: Observers' Notes, Article by Article* (2nd Edn, Nomos Verlagsgesellschaft 2008) 1107-1115.

23 Rome Statute, Article 56.

24 See for example, *Lubanga case* 'Decision on the applications for participation in the proceedings of a/0001/06, a/0002/06 and a/0003/06 in the case of the Prosecutor v. Thomas Lubanga Dyilo and the investigation in the Democratic Republic of Congo' (28 July 2006) ICC-01/04-01/06-228-tEN.

25 See Bitti in: Otto Triffterer (ed), *Commentary on the Rome Statute of the ICC: Observers' Notes, Article by Article* (2nd Edn, Nomos Verlagsgesellschaft 2008) 1199-1218.

26 *ICC, Structure of the Court, Chambers, Trial Division* <http://www.icc-cpi.int/menus/icc/structure%20of%20the%20court/chambers/trial%20division/trial%20division?lan=en-GB> accessed 31 August 2012.

necessary for the determination of the truth, and may, according to Rule 103 of the RPE, invite or grant leave to *amicus curiae* to give an observation on any issue that the Chamber considers appropriate. As will be hereinafter further analysed, in the *Lubanga case*, the Trial Chamber called four expert witnesses, among them, the UN Secretary General Representative for Children and Armed Conflict, and an expert on children with trauma.[27]

The Trial Chamber also decides on applications of victims to participate in the trial proceedings and the manner in which they will do so. Most importantly, the Trial Chamber judges decide on the acquittal or conviction (Article 74 of the Rome Statute) and sentence (Article 76 of the Rome Statute) of an accused person, as well as on reparations orders (Article 75 of the Rome Statute).

Finally, judges may form part of the *Appeals Division*, which is formed by 5 judges, all of them serving as an Appeals Chamber. Pursuant to Article 81 of the Rome Statute, the Appeals Chamber has the power to decide on the appeals against final decisions, such as acquittal, conviction or sentence against an accused. The Appeals Chamber may also decide on interlocutory appeals of pre-trial and trial decisions. Finally, the Appeals Chamber may revise a final judgment of conviction or sentence, if the requirements established in Article 84 of the Rome Statute are met.

Although, as will be analysed in Chapter 3, the decisions of the Appeals Chamber are not binding, its criteria are often referred to by other ICC Chambers and thus they are due to influence the moulding of the ICC's case law. As many of the provisions under the Rome Statute are open to interpretation, the decisions and judgments of the Appeals Chamber are important, particularly in the ICC's first cases. For example, the Appeals Chamber has set principles regarding victims' participation and has also established principles for the interpretation and application of the Rome Statute pursuant to international human rights law.[28] However, more guidance is still required, for example as regards the victims' application process, which as will be further analysed in Chapter 5, is different amongst the various ICC Chambers.

2.2.3 The Registry

The Registry is the main administrative organ of the ICC and is, unlike the OTP, under the authority of ICC's Presidency (Article 43(2) of the Rome Statute). Though both the Presidency and the OTP can sign agreements with States and other international actors, the Registrar is the main focal point between the

27 The testimony of these two expert witnesses is analysed in depth in Chapters 4 and 5 below.
28 This is further analysed in Chapters 3 and 5 below.

ICC and the ASP, other States and international organisations and NGOs. The Registrar is also the focal point between the TFV and the ICC.[29]

The Registry is composed of multiple sections and divisions, which have been set up to fulfil the mandate provided for in the Rome Statute and the RPE. All of them play a role in the fulfilment of children's rights before the ICC.

As will be studied in Chapter 5, the outreach work of the Public Information and Documentation Section (PIDS) is crucial so that child victims and witnesses understand the nature of the ICC in a way and manner that is comprehensible according to their age, maturity and level of education (*i.e.* its jurisdiction, the possibility of victims to participate in proceedings, the right to reparations, etc.).[30]

In accordance with Article 43(6) of the Rome Statute, the *VWU* provides protective and security measures, counselling, and support for victims and witnesses, their family members and any other person at risk. Although this vast role of the VWU is further explained in Chapter 5, it is important to state at the outset that the main purpose of the VWU should be to prevent the re-victimisation of victims and witnesses as a result of their participation before the ICC. Victims and witnesses of the current situations before the ICC travel to a foreign country and appear before a foreign court. They participate in unfamiliar proceedings, in a language that often is not their own, face the perpetrators, testify about horrendous experiences, encounter cross-examination, and possibly also place themselves and others at risk.[31] The VWU must thus assist victims and witnesses so that such interaction is made in a manner that protects their well-being and security, but also with due regard to the rights of the accused and the integrity of the judicial proceedings. In order to fulfil this mandate, and pursuant to the Rome Statute, the VWU shall include staff members with expertise in trauma, children and disabled victims and victims of sexual violence.

In order to ensure that victims receive support in the application process to request participation or reparations before the ICC, there is a *Victims Participation and Reparations Section* (VPRS) within the Registry. In relation to victims' participation, the VPRS supports victims in their initial organisation to participate before the ICC, including in the selection of their common or individual legal representative. In relation with victims' reparations, the VPRS is responsible for assisting victims in obtaining reparations, including giving publicity to reparations proceedings before the ICC as well as assisting victims

29 *ICC, Structure of the Court, Registry* <http://www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Registry> accessed 31 August 2012.

30 UNGA, *CRC* (20 November 1989) UN *Treaty Series* vol 1577 p 3 (CRC) article 12.

31 Thordis Ingadottir and others *The International Criminal Court, The Victims and Witnesses Unit (Article 43.6 of the Rome Statute): A discussion paper* (Project on International Courts and Tribunals (PICT) March 2000).

in submitting applications for protective measures and for the purposes of confiscating property from the suspect or accused persons. Most importantly, as the ICC may decide to grant reparations through the TFV, the VPRS may assist victims in their dealings with this entity. The role of the VPRS will also be analysed in more detail in Chapter 5.

Another autonomous organ of the ICC that deals with victims is the *Office of Public Counsel for Victims (OPCV)*. This office has the mandate to support and assist legal representatives and victims in their participation in ICC proceedings as well as in their requests for reparations. In accordance with Regulation 81 of the RoC, the OPCV may also conduct legal research and advice and may appear in hearings in respect of issues relevant to victims. In this sense, the OPCV could conduct research on the particular situation of child victims of international crimes or the impact of armed conflict on children (*i.e.* for reparations matters). As the OPCV is an impartial and independent office, which is part of the Registry only for administrative purposes, their legal opinion could be of great assistance to the Chamber, as it could avoid or solve conflicts of interests between victims (*i.e.* regarding common legal representation). In the past, the OPCV has represented victims during the application process and during their participation in ICC proceedings. The OPCV has also been granted leave to make submissions on issues concerning victims.[32] In the first reparations proceedings before the ICC, the OPCV was granted leave to represent the interests of victims who had not applied for reparations but eventually may be beneficiaries of collective reparations.[33] Moreover, recently in the *Gbagbo case*, the OPCV has been assigned as common legal representative of victims participating in the confirmation of charges hearing.[34] Likewise, in the Kenya cases the OPCV has been given a prominent role to act together with the common legal representatives for victims.[35]

The TFV is administered by the Registry but is supervised by an independent Board of Directors, elected by the ASP. The mission of the TFV is to grant reparations to victims, either with its own funds (grants from governments, individuals or international organisations) or through funds deposited by the ICC resulting from payment of fines or forfeitures of a convicted person. According to the RTFV, other resources of the TFV (other than

32 See: *Lubanga case* 'Order on the Office of Public Counsel for Victims' request filed on 21 November 2007' (27 November 2007) ICC-01/04-01/06-1046 para. 2; The Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui (*Katanga and Ngudjolo case*) 'Ordonnance relative à la soumission d'écritures sur l'interprétation de la norme 42 du Règlement de la Cour (norme 28 du Règlement de la Cour)' (12 June 2009) ICC-01/0401/07-1205.

33 *Lubanga case* 'Decision on OPCV's request to participate in reparations proceedings' (5 April 2012) ICC-01/04-01/06-2858 para. 12.

34 The Prosecutor v Laurent Gbagbo (*Gbagbo case)* ' Decision on Victims' Participation and Victims' Common Legal Representation at the Confirmation of Charges Hearing and in the Related Proceedings' (4 June 2012) ICC-02/1101/11-138, paras 42-44.

35 *Kenyatta and Muthaura case* 'Decision on victims' representation and participation' (3 October 2012) ICC-01/09-02/11-498.

those obtained by fines and forfeitures) may be used to benefit victims and their families "who have suffered physical, psychological and/or material damage as a result of these crimes", even before the Trial Chamber renders a conviction judgment.[36] This possibility is essential for child victims, as rehabilitation programmes could be initiated promptly, without having to wait for a final judgment from a Chamber.

Although the mandates of the Registry (PIDS, VPRS, VWU), the OPCV and the TFV are further analysed in Chapter 5 of this research, it is important to observe that all these sections of the ICC, in one way or another, facilitate the participation of victims in ICC proceedings, provide support and protection to victims and witnesses, and facilitate and grant victims' access to reparations. The aforementioned sections, along with the OTP, will most likely be the first point of contact between child victims and witnesses and the ICC. Accordingly, they must work in unison, avoiding overlapping or inconsistent approaches to the interpretation and application of the Rome Statute and other ICC legal instruments, in order to guarantee the protection of child victims and witnesses pursuant to Article 68(1) of the Rome Statute, enable them to present their views and concerns in judicial proceedings pursuant to Article 68(3) of the Rome Statute, and facilitate reparations for the harms they could have suffered as a result of crimes within the ICC jurisdiction pursuant to Article 75 of the Rome Statute.

2.2.4 The OTP

As provided for in Article 41, paragraph 1 of the Rome Statute, the OTP is an independent and separate organ of the ICC responsible for the investigation and prosecution of crimes within the ICC's jurisdiction, as a result of referrals received from State Parties or the UN Security Council or on the basis of *proprio motu* investigations.

In light of its independence, in 2003 the OTP adopted a "Paper on some policy issues before the OTP", which delineated since the beginning the general strategy of this organ of the ICC.[37] From the outset the Prosecutor established that due to its limited resources, as a general rule, his office would "initiate prosecutions of the leaders who bear most responsibility for crimes" and would "encourage national prosecutions for the lower-ranking perpetrators, or work with the international community to ensure that offenders are brought to justice by some other means".[38]

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36 ICC Assembly of States Parties, *Regulations of the Trust Fund for Victims* (3 December 2005) ICC-ASP/4/Res.3 (RTFV) paras 48-50.

37 ICC, OTP, *Paper on Some Policy Issues Before the OTP* (September 2003) <http://www.amicc.org/docs/OcampoPolicyPaper9_03.pdf> accessed 31 August 2012.

38 Ibid 3.

It is important to notice that this prosecution policy, limited to the most serious crimes and against those who bear the most responsibility, classified crimes committed against children as major international crimes and its first two cases included charges for enlistment, conscription and use of children to actively participate in hostilities.[39]

The role of the OTP, particularly its obligation to protect the security, safety and well-being of child victims and witnesses pursuant to Article 68(1) of the Rome Statute, will be further analysed in Chapter 5 of this research. In this sense, this research will address the obligation of the OTP to safeguard the probative value of witnesses' testimonies (including children), and hence preserve the fairness of proceedings by putting in place mechanisms to prevent false testimonies and improper practices by intermediaries and investigators that not only affect the evidence of witnesses as such, but may also lead to their re-victimisation.

2.3 CHILD-SENSITIVE READING OF THE ROME STATUTE AND OTHER ICC PROVISIONS

Children have interacted and will interact with the ICC as victims and witnesses. As stated in the document adopted in UNGA Special Session on Children in May 2002:

> '(…) children are among the principal victims of war,(…) in the last decade, an estimated 2 million children have died and 6 million have been wounded as a direct result of armed conflict (…) 300,000 child soldiers (…) are exploited in armed conflicts in over 30 countries around the world.'[40]

Consequently, as argued in the Introduction, a children's rights approach should be adopted throughout all the ICC organs and entities analysed above. As noted by the CRC Committee, such an approach requires a paradigm shift away from child protection approaches in which children are perceived and treated as "objects" in need of assistance rather than as rights holders entitled to non-negotiable rights to protection.[41] As studied in Chapter 1 of this research, there are at least three different " images" of children that should be taken into consideration when adopting a children's rights approach at the

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39 The Prosecutor v Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongwen (*Kony and others case*) 'Warrant of Arrest for Joseph Kony issued on 8 July 2005 as amended on 27 September 2005' (27 September 2005) ICC 02/0401/05-53; *Lubanga case* 'Warrant of Arrest' (10 February 2006) ICC-01/04-01/06-2-tEN.

40 No Peace without Justice, *International Criminal Justice and Children* (UNICEF Innocenti Research Centre, September 2002) 12.

41 CRC Committee, *General comment No. 13 (2011): The right of the child to freedom from all forms of violence* (18 April 2011) CRC/C/GC/13, para. 59.

ICC: the victim, the perpetrator and the peace-maker. Moreover, within these three general images, there are particular circumstances and realities that must also be taken into consideration (*i.e.* a boy child soldier must be distinguished from the girl child soldier who additionally suffered from sexual violence/ forced marriage).

Within the current situations before the ICC, the OTP has investigated and brought charges for crimes committed against children.[42] Consequently, child victims and witnesses have participated in the ICC's first trials. As noted in the Introduction and as will be further analysed in Chapters 5 and 6 of this research, a children's rights perspective was not only desirable in terms of achieving international standards, but in fact was necessary in order to avoid the unfortunate consequences of the *Lubanga case*, particularly vis-à-vis the rights of the accused, since child victims and witnesses were found unreliable and untrustworthy and investigators and intermediaries could have breached the statutory obligation to protect victims and witnesses, and to take into account the needs of victims and witnesses, particularly children.

In order to fulfil these obligations enshrined in Article 68 of the Rome Statute and Rule 86 of the RPE, child-friendly procedures need to be adopted and the ICC's staff must have adequate experience and training in a children's rights perspective.[43]

As will be analysed in the following Chapter, a child-sensitive reading of the ICC provisions requires ICC practitioners to go beyond the Rome Statute and the RPE of the ICC, by applying other international instruments that could provide further guidance as to the interpretation and application of the ICC provisions from a children's rights perspective. In accordance with Article 21(3) of the Rome Statute, the application of the CRC and other international instruments on children's rights is not only essential, but mandatory to interpret and apply ICC provisions pursuant to internationally recognised human rights. As will be analysed in the following Chapter, the CRC is an international human rights instrument of almost universal ratification. As such, it should guide the ICC's work when dealing with child victims and witnesses. Its fundamental principles should also be guiding principles of the ICC when dealing with child victims and witnesses. As correctly noted by Mconigle Leyh, when an international criminal court deviates from minimum human rights standards, the court undermines existing human rights and minimum rights are the baseline under which a court cannot go without compromising fairness

42 *Kony and others case* 'Warrant of Arrest for Joseph Kony issued on 8 July 2005 as amended on 27 September 2005' (27 September 2005) ICC 02/04 01/05-53; *Lubanga case* 'Warrant of Arrest' (10 February 2006) ICC-01/04 01/06-2-tEN; The Prosecutor v Germain Katanga and The Prosecutor v Mathieu Ngudjolo (*Katanga and Ngudjolo case)* 'Mandat d'arrêt à l'encontre de Germain Katanga' (18 October 2007) ICC-01/04-01/07-1; 'Mandat d'arrêt à l'encontre de Mathieu Ngudjolo Chu' (7 February 2008) ICC-01/04-02/07-260.

43 No Peace without Justice, *International Criminal Justice and Children* (UNICEF Innocenti Research Centre, September 2002) 15.

and effectiveness.[44] Insofar as children's rights standards do not compromise or diminish the rights of the accused person enshrined in Article 67 of the Rome Statute, they should be applied in order to interpret and apply ICC provisions from a children's rights perspective.

The following Chapter will analyse applicable law in depth, beyond statutory provisions, and particularly paying attention to international children's rights instruments that could be helpful to pursue the ICC's obligations as regards child victims and witnesses.

44 Brianne McGonigle Leyh, *Procedural Justice? Victim Participation in International Criminal Proceedings*, (Intersentia 2011), 360.

3 Application of children's rights to the ICC's legal framework

3.1 INTRODUCTION

This Chapter firstly analyses Article 21 of the Rome Statute, which lists the ICC's applicable sources of law, evaluating the different points of views of commentators in relation to this pivotal provision as well as the developing ICC case law in this regard. Taking Article 21 of the Rome Statute as a starting point, the Chapter then refers to other sources of law that could be applied or used as guidance in judicial proceedings pertaining to children, namely the CRC and its Optional Protocols, the Geneva Conventions and their Additional Protocols, as well as other "soft law" instruments, including the Paris Principles and UN Resolutions. The Chapter will then assess applicability of the case law of other international tribunals in the ICC's legal framework. Taking into consideration their relevance as regards children in judicial proceedings, this Chapter will mainly analyse the case law of the SCSL as well as the regional human rights courts (primarily the Inter-American and European Courts of Human Rights).

This Chapter is not intended to exhaust all possible applicable instruments or case law regarding children's rights in ICC proceedings. However, it endeavours to provide the reader with the basic legal tools to mainstream a children's rights perspective through the application and interpretation of ICC provisions in accordance with internationally recognised children's rights. As stated by the IACtHR and the European Court of Human Rights (ECtHR), human rights treaties are living instruments, whose interpretation must go hand in hand with evolving times and current living conditions.[1] Although the Rome Statute can be seen as a "criminal code", it is also an international human rights and humanitarian law treaty. Thus, whoever interprets the ICC provisions (whether a judge, prosecutor, legal representative or an ICC staff member) must also constantly revise and update the list of "applicable law" referring to internationally recognised human rights, pursuant to Article 21(3) of the Statute.

While the ICC is a criminal court, its human rights and international humanitarian law foundations are undeniable. As noted by Werle, international

1 ECtHR, *Tyrer v the United Kingdom* 25 April 1978 Series A no 26, para. 31; IACtHR, Case of the Mapiripán Massacre v Colombia (*Mapiripán Case*) Merits Reparations and Costs, Judgment of September 15, 2005 Series C No 134, para. 106.

criminal law is an instrument for the protection of human rights, as it complements other human rights instruments and thus aims to their protection.[2] Additionally, the same author states that the duty to protect human rights is not fulfilled with the application of international criminal law by convicting and sentencing perpetrators. In his view, it is important to apply the law in order to protect victims and to determine reparations to victims within international criminal proceedings.[3] Moreover, as stated by Cryer, international criminal law developed in response to mass abuses of international humanitarian law and human rights law.[4] In fact, Article 36 of the Statute clearly states that ICC judges "shall" either have established competence in criminal law and procedure or international law, such as international humanitarian law and law of human rights. The requirement to have judges specialised in these two areas of law evidences that human rights and humanitarian law are intrinsic to the ICC.

Ohlin also identifies "standard setting" as a more specific goal of international criminal procedure, stating that international trials provide an exemplar against which domestic legal systems can measure their own criminal procedure and make necessary improvements.[5] Thus, the interpretation and application of ICC provisions should not only meet internationally recognised human rights standards for the sake of international criminal proceedings, but also bearing in mind that the ICC case law and practice will have resonance in domestic proceedings.

Nonetheless, one could argue that the ICC, as an international organisation, is not bound by international human rights treaties, which are signed and ratified by States and which refer specifically to State responsibility. The ICC is not a party to international human rights treaties and thus it may be considered that it is not formally bound by their provisions or the case law of human rights courts.[6] However, as stated by Gradoni, although an inter-

2 Gerhard Werle, *Tratado de Derecho Penal Internacional* (Tirant lo blanch tratados 2005) 98-100.

3 Gerhard Werle, *Tratado de Derecho Penal Internacional* (Tirant lo blanch tratados 2005) 100.

4 Robert Cryer and others, *An Introduction to International Criminal Law and Procedure* (Cambridge University Press, 2007) 9-10. See also Jen David Ohlin in: Goran Sluiter and others (eds), *International Criminal Procedure, Principles and Rule*s (Oxford University Press 2013), 55 and 66. The author states that there are two identifiable and overlapping objectives of international criminal law: a) restoring international peace and security; and b) strengthening human rights and international humanitarian law prospectively. Some, like Triffterer, go even beyond, as he believes that international criminal justice could be used in the future "to abolish starvation, hunger, poverty and similar intolerable forms of social injustice in the world", which in his view are caused by international terrorism, drug offences and abuse of power. See: Otto Triffterer, *The Object of Review Mechanisms: Statute's Provisions, Elements of Crimes and Rules of Procedure and Evidence*, in: Roberto Belleli (ed), *International Criminal Justice, Law and Practice from the Rome Statute to its Review* (Ashgate 2010) 381.

5 Jen David Ohlin in: Goran Sluiter and others (eds), *International Criminal Procedure, Principles and Rule*s (Oxford University Press 2013), 66.

6 Robert Cryer and others, *An Introduction to International Criminal Law and Procedure* (Cambridge University Press, 2007) 353-354.

national organisation is not a party to any human rights treaty, it is nevertheless bound by norms similar or identical in content of international customary law or general principles of law.[7] This consideration is in fact reflected and made explicit in Article 21(3) of the Rome Statute, which, as will be analysed further below, requires that the application and interpretation of the law be made pursuant to internationally recognised human rights.

Gradoni has identified four manners in which human rights shape international criminal proceedings. Firstly, the statutes and other provisions of international tribunals refer to human rights or related concepts. In the case of the ICC, as noted earlier, this is evidenced in provisions such as Article 67 of the Statute on the rights of the accused. Secondly, the practice of international criminal tribunals demonstrates the place of human rights norms within their legal systems. In the case of the ICC, contrary to other international tribunals, Article 21(3) of the Statute distinctly places human rights in a paramount position within the ICC legal framework. Thirdly, the practice of international tribunals extracts the content of relevant human rights standards from human rights instruments of various sorts (including "soft law" and regional instruments), as well as from case law of human rights courts or bodies. In the case of the ICC, as will be studied in this Chapter, the ICC case law has referred to international human rights treaties (such as the CRC), soft law human rights instruments (such as the Paris Principles), as well as regional human rights case law. Lastly, international criminal practice may use statutory human rights norms (such as Article 67 of the Statute) to interpret ICC provisions, override hierarchically inferior ones, and derive power-conferring norms.[8]

In light of the above, it is but expected that the ICC refers to human rights law in their interpretation of substantive and procedural international criminal law.[9] As noted by Gradoni, although human rights are not strictly speaking rules of international criminal procedure, they have nonetheless a considerable impact on the way in which those rules are defined, interpreted and applied.[10] Article 67 of the Statute on the rights of the accused is the clearest example of the relationship between human rights standards and international criminal proceedings. It would be contrary to the ICC's goals (among them, and pur-

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7 Lorenzo Gradoni in: Goran Sluiter and others (eds), *International Criminal Procedure, Principles and Rule*s (Oxford University Press 2013) 80-81. The author also refers to the International Court of Justice (ICJ), Interpretation of the Agreement of 25 March 1951 between the World Health Organisation and Egypt (20 December 1980), para 27, in which the ICJ found that international organisations are subjects of international law and, as such, are bound by any obligation incumbent upon them under general rules of international law.

8 Lorenzo Gradoni in: Goran Sluiter and others (eds), *International Criminal Procedure, Principles and Rule*s (Oxford University Press 2013) 74.

9 Robert Cryer and others, *An Introduction to International Criminal Law and Procedure* (Cambridge University Press, 2007) 10.

10 Lorenzo Gradoni in: Goran Sluiter and others (eds), *International Criminal Procedure, Principles and Rule*s (Oxford University Press 2013) 74.

suant to the Statute's Preamble, to guarantee international justice) if the ICC would not apply international human rights standards in its criminal proceedings, including not only in the determination of guilt or innocence of the accused, but also when deciding on victims and witnesses protection pursuant to Article 68(1) of the Statute, victims' participation as enshrined in Article 68(3) of the Statute, and victims' reparations in accordance with Article 75 of the Statute.

3.2 Introduction to Article 21 of the Rome Statute

Article 21 of the Statute is the core provision dealing with applicable law before the ICC. As pointed out by McAuliffe de Guzman, this Article is the first codification of sources in international criminal law.[11] It reads as follows:

> '1. The ICC shall apply:
> (a) In the first place, this Statute, Elements of Crimes and its RPE;
> (b) In the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict;
> (c) Failing that, general principles of law derived by the ICC from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards.
> 2. The ICC may apply principles and rules of law as interpreted in its previous decisions.
> 3. The application and interpretation of law pursuant to this Article must be consistent with internationally recognized human rights, and be without any adverse distinction founded on grounds such as gender as defined in Article 7, paragraph 3, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status.'

Accordingly, all legal arguments submitted by participants before the ICC and all ICC decisions should be based on the sources of law stipulated in the provision above.

As explained by Bitti, there are three interesting aspects in this provision of the Rome Statute. In the first place, its existence is an innovation because there is no provision on applicable law in any of the Statutes of other international criminal tribunals (Nuremberg, International Criminal Tribunal for Former Yugoslavia (ICTY), ICTR, SCSL, Extraordinary Chambers in the Courts of Cambodia (ECCC) or the Special Tribunal for Lebanon), as they all rely on

11 Mc Auliffe de Guzman in: Otto Triffterer (ed), *Commentary on the Rome Statute of the ICC: Observers' Notes, Article by Article* (2nd Edn, Nomos Verlagsgesellschaft 2008) 703.

Article 38 of the Statute of the International Court of Justice in this regard.[12] In the second place, the specificity of its content is also a novelty since, pursuant to this provision, the sources of law of the ICC are: a) the Rome Statute, the Elements of Crimes and the RPE; b) applicable treaties and principles and rules of international law; and c) general principles deriving from national legal systems. Finally, Bitti recognises that Article 21 of the Rome Statute is innovative as it creates a hierarchy between all these sources of law, which is unique to the ICC, and does not follow the hierarchy of sources of law provided for in Article 38 of the Rome Statute of the International Court of Justice. Thus, although at first glance it appears that the Rome Statute, Elements of Crimes and RPE all have the same hierarchical level as ICC's legal texts, in light of the Rome Statute's Articles 9(3) (the Elements shall be consistent with the Rome Statute) and 51(5) (in the event of conflict between the RPE and the Rome Statute, the Rome Statute shall prevail), it is clear that the Rome Statute has a superior hierarchy over the Elements of Crimes and RPE. This has been confirmed by the Pre-Trial and Appeals Chambers, which have determined that the RPE and the RoC are subordinated to the Rome Statute.[13] Furthermore, during the first ten years of the ICC's existence, other internal sources of law have been adopted, that although not included in Article 21 of the Rome Statute, are without a doubt internal sources of law that have been regularly applied by ICC's Chambers (they are: the RoC, the RoR, the Code of Professional Conduct for Counsel, and the RTFV).

Article 21(1)(b) and (c) of the Rome Statute provide two subsidiary and external sources of law, namely sources of international law (second source) and sources of national laws (third source).

As a second source, Article 21(1)(b) identifies the following: applicable international treaties, and principles and rules of international law. As regards this second source (sources of international law under Article 21(1)(b), the Rome Statute makes no difference between applicability of either "applicable treaties" and "principles and rules of international law". Thus, as maintained by Sadat, subparagraph 1(b) "permit(s) judges considerable leeway in considering which sources of international law could be appropriately applied in a particular case".[14]

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12 Gilbert Bitti, 'Article 21 of the Rome Statute of the International Criminal Court and the treatment of sources of law in the jurisprudence of the ICC' in: Carsten Stahn and Göran Sluiter (eds), *The Emerging Practice of the International Criminal Court* (Brill 2008).

13 *DRC Situation* 'Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6' (17 January 2006) ICC-01/04 101-tEN-Corr para. 47; *Lubanga case*, 'Judgment on the appeal of Mr Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled 'Décision sur la demande de mise en liberté provisoire de Thomas Lubanga Dyilo' (13 February 2007) ICC-01/04-01/06-824 para. 43.

14 Leila Sadat '*The ICC and the Transformation of International Law: Justice for the New Millennium*' (Transnational, 2002) 177.

As a third source, Article 21(1)(c) identifies the following: general principles of law derived by the ICC from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime. The third source of law derives from national systems, namely "general principles of law derived by the ICC from national laws of legal systems of the world, including, as appropriate, the national laws of the States that would normally exercise jurisdiction over the crime". Commentators such as McAuliffe de Guzman, describe this part of Article 21 of the Rome Statute as being the most controversial. She considers that the less often the ICC considers these sources of law, the more likely it will be able to develop a cogent body of international law.[15] However, if one considers that these sources of law will be applicable as long as they are not inconsistent with the Rome Statute, contradictions and discrepancies may be diminished.[16]

The Appeals Chamber of the ICC has concluded that the application of the second and third sources of law is subject to a condition: the existence of a gap in the Rome Statute.[17] They are thus subsidiary sources of law and cannot be used just to "add" to the Rome Statute and the RPE other procedural remedies, but should act as sources of law only when there is a *lacuna* in the Rome Statute and the RPE.[18]

Bitti affirms that if the ICC case law maintains this current view, application of international law before the ICC will be more restrictive than its predecessors, the ad-hoc tribunals, and will be based more on the 128 Articles and 225 Rules of the ICC than on general sources of international and national laws.[19] However, since no legal system is deprived of such lacunae, these sources of law, deriving from national and international law, may be of great value for ICC judges.[20] Moreover, this "restriction" may only be apparent, since the Appeals Chamber has also stipulated that other sources of law, although not applicable *per se*, may act as "guidance" for the interpretation and application of the Rome

15 Mc Auliffe de Guzman in: Otto Triffterer (ed), *Commentary on the Rome Statute of the ICC: Observers' Notes, Article by Article* (2nd Edn, Nomos Verlagsgesellschaft 2008) 708-709.

16 Roy S Lee, *The International Criminal Court: The Making of the Rome Statute* (Kluwer International 1999) 215.

17 *Lubanga case* 'Judgment on the Appeal of Mr Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the ICC pursuant to Article 19(2)(a) of the Rome Statute of 3 October 2006' (14 December 2006) ICC-01/04-01/06-772, para. 34.

18 *DRC Situation* 'Judgment on the Prosecutor's Application for Extraordinary Review of the Pre-Trial Chamber's 31 March 2006 Decision Denying Leave to Appeal' (13 July 2006) ICC-01/04-168, paras 33-42.

19 Gilbert Bitti, 'Article 21 of the Rome Statute of the International Criminal Court and the treatment of sources of law in the jurisprudence of the ICC' in: Carsten Stahn and Göran Sluiter (eds), *The Emerging Practice of the International Criminal Court* (Brill 2008).

20 Mc Auliffe de Guzman in: Otto Triffterer (ed), *Commentary on the Rome Statute of the ICC: Observers' Notes, Article by Article* (2nd Edn, Nomos Verlagsgesellschaft 2008) 701-712.

Statute and other ICC provisions.[21] Thus, although in appearance the ICC Appeals Chamber has been strict in applying sources under Article 21(1)b) and 21(1)(c), it has opened the door to refer in essence to any international instrument (including "soft law" instruments) as "guidance". For example, the Appeals Chamber concluded that "soft law" instruments such as the UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (UN Basic Principles) may be used as "guidance".[22] Therefore, documents that are far from being "internationally recognised human rights" or international customary law, may still be used by ICC judges as "guidance", or draw inspiration, when making their decisions, insofar as these "guiding" instruments are not contrary to the Rome Statute.[23]

The second paragraph of Article 21 of the Rome Statute gives the possibility to the ICC to apply case law from its previous decisions, but does not compel a Chamber to necessarily follow a previous ruling in a given matter (the provision uses the word *may* but not *shall*), including decisions of the Appeals Chamber. As such, the Rome Statute does not distinguish between case law of the Appeals Chamber and the other Chambers, and this has been reflected in the ICC's recent case law. For example, as identified by Bitti, the Pre-Trial Chambers and the Trial Chamber have made reference to their own case law and that of other Pre-Trial, Trial and Appeals Chambers, without giving any superior weight to the case law of the Appeals Chamber.[24]

As stated by Lee, this provision is a "soft approach" to case law, as it refers only to the applicability of principles and rules of law as interpreted in its previous decisions which the judges may or may not decide to apply under their discretionary powers.[25] Moreover, contrary to the subsidiary sources under paragraph 1(b) and (c) analysed above, applicability of the ICC case law is not subject to any *lacuna* under the ICC's Statute.

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21 *Lubanga case* 'Judgment on the appeals of The Prosecutor and The Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008' (11 July 2008) ICC-01/04-01/06-1432, para. 33.

22 UNGA, *UN Basic Principles* (21 March 2006) A/RES/60/147.

23 Drumbl correctly states that the view of global civil society, child rights advocates and intergovernmental organisations (including UN agencies) do not constitute international law. However, he acknowledges that these actors currently shape the content of binding international law. See Mark Drumbl, *Reimagining Child Soldiers in International Law and Policy* (Oxford University Press 2012) 135. See also: Lorenzo Gradoni in: Goran Sluiter and others (eds), *International Criminal Procedure, Principles and Rule*s (Oxford University Press 2013) 89.

24 Gilbert Bitti, 'Article 21 of the Rome Statute of the International Criminal Court and the treatment of sources of law in the jurisprudence of the ICC' in: Carsten Stahn and Göran Sluiter (eds), *The Emerging Practice of the International Criminal Court* (Brill 2008).

25 Gilbert Bitti, 'Article 21 of the Rome Statute of the International Criminal Court and the treatment of sources of law in the jurisprudence of the ICC' in: Carsten Stahn and Göran Sluiter (eds), *The Emerging Practice of the International Criminal Court* (Brill 2008) 215.

The jurisprudence of other international tribunals has also been referred to in ICC decisions. However, this source of law is nowhere to be found in Article 21 of the Rome Statute.[26] Accordingly, it appears that this jurisprudence could only be applicable if it has created "principles and rules of international law", including the "established principles of the international law of armed conflict", under Article 21(1)(b) of the Rome Statute. However, as explained above, application of this jurisprudence would be, according to the rulings of the Appeals Chamber, subject to a *lacuna* or gap in the Rome Statute and the RPE. Nevertheless, the application of this case law could be difficult, since, as noted by Bitti, in the diversity of case law of the international tribunals, it appears that "international criminal practice" has become as diverse as national criminal practice. Thus, it may be difficult, if not impossible, to identify principles and rules that could be of general application throughout all international criminal tribunals.[27] This in fact has been affirmed by Trial Chamber I of the ICC, which stated in a decision referring to the practice of "witness proofing" in the ad-hoc tribunals, that:

> '(…) while acknowledging the importance of considering practice and jurisprudence of the ad hoc tribunals, the Chamber is not persuaded that the application of the ad hoc procedures, in the context of preparation of witnesses for trial, is appropriate.'[28]

In fact, Trial Chamber I of the ICC adopted a completely different approach to that taken in the ad-hoc tribunals by prohibiting practice of witness proofing, despite the fact that this had been common practice in the ad-hoc tribunals. This issue, however, as will be analysed further in Chapter 5, raises a more serious question, since the practice of "witness proofing" prohibited in the Lubanga case, but also in the Katanga and Ngudjolo case and the Bemba case, has now been permitted (albeit with the different name of "witness preparation") in the two Kenya Situation cases.[29] Hence, this example reflects not only that the practice of international tribunals is diverse, but that the practice within the same ICC is just as varied (and sometimes contradictory).

Paragraph 3 of Article 21 of the Rome Statute, although located at the end of this provision, could be regarded in fact as a "chapeau", which provides

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26 Gilbert Bitti, 'Article 21 of the Rome Statute of the International Criminal Court and the treatment of sources of law in the jurisprudence of the ICC' in: Carsten Stahn and Göran Sluiter (eds), *The Emerging Practice of the International Criminal Court* (Brill 2008).

27 Gilbert Bitti, 'Article 21 of the Rome Statute of the International Criminal Court and the treatment of sources of law in the jurisprudence of the ICC' in: Carsten Stahn and Göran Sluiter (eds), *The Emerging Practice of the International Criminal Court* (Brill 2008).

28 *Lubanga case* 'Decision regarding the practices used to prepare and familiarise witnesses for giving testimony at trial' (30 November 2007) ICC-01/04-01/06-1049, para. 45.

29 *Ruto and Sang case* 'Decision on witness preparation' (2 January 2013) ICC-01/09-01/11-524; *Kenyatta and Muthaura case* 'Decision on witness preparation (2 January 2013) ICC-01/09-02/11-588.

a general consistency test for the interpretation and application of the law, subject to internationally recognised human rights. This last paragraph of Article 21 also includes an express prohibition on adverse distinction of any sort, including age, race, colour, language, religion or belief, political or other opinion, national, ethnic, or social origin, wealth, birth or other status. As noted above, neither the Nuremberg nor Tokyo Tribunals, the ad-hoc tribunals nor the SCSL has had any similar human rights related provision as Article 21(3) of the Rome Statute.

Although the application of human rights law in these other tribunals was implicitly accepted, Article 21(3) of the Statute has, as described by Gradoni, made an explicit transformative *renvoi* to human rights law.[30] The same author believes that this provision has the advantage of giving in a few words the essence of current practices and it also reflects, through its relative vagueness, "the decentralized structure of authority of human rights law and jurisprudence". Along the same lines, Schabas has commented that this provision is rich with potential, as it governs the application and interpretation of all statutory provisions, as well as all of the other sources of applicable law. The author even goes to the extent of stating that Article 21(3) of the Rome Statute is analogous to constitutional provisions that authorise courts to interpret and even disallow legislated texts if they are incompatible with fundamental human rights or are discriminatory.[31]

In fact, in the *Katanga and Ngudjolo case*, the Trial Chamber concluded that it was unable to apply Article 93(7) of the Rome Statute in conditions, which were inconsistent with internationally recognised human rights law, as required by Article 21(3) of the Rome Statute.[32] Thus, although statutory provisions may be set aside when their application could be contrary to internationally recognised human rights law, they are not invalidated, but simply set aside on a case-by-case basis.[33]

The Appeals Chamber of the ICC has stated the following regarding the "constitutional" nature of paragraph 3 of Article 21:

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30 Lorenzo Gradoni in: Goran Sluiter and others (eds), *International Criminal Procedure, Principles and Rule*s (Oxford University Press 2013) 76, 82.

31 William Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (Oxford University Press 2010) 398. See also: Gilbert Bitti, 'Article 21 of the Rome Statute of the International Criminal Court and the treatment of sources of law in the jurisprudence of the ICC' in: Carsten Stahn and Göran Sluiter (eds), *The Emerging Practice of the International Criminal Court* (Brill 2008).

32 *Katanga and Ngudjolo case* 'Decision on an Amicus Curiae application and on the "Requête tendant à obtenir présentations des témoins DRC-D02-P-0350, DRC-D02-P-0236, DRC-D02-P-0228 aux autorités néerlandaises aux fins d'asile" (articles 68 and 93(7) of the Statute)'(9 June 2011) ICC-01/04-01/07-3003, para. 73.

33 Lorenzo Gradoni in: Goran Sluiter and others (eds), *International Criminal Procedure, Principles and Rule*s (Oxford University Press 2013) 83.

> 'More importantly, Article 21 (3) of the Rome Statute makes the interpretation as well as the application of the law applicable under the Rome Statute subject to internationally recognised human rights. It requires the exercise of the jurisdiction of the ICC in accordance with internationally recognised human rights norms.'[34]

In another judgment, the Appeals Chamber affirmed the following regarding Article 21(3):

> '(…) law applicable under the Rome Statute must be interpreted as well as applied in accordance with internationally recognized human rights. Human rights underpin the Rome Statute; every aspect of it, including the exercise of the jurisdiction of the ICC. Its provisions must be interpreted and more importantly applied in accordance with internationally recognized human rights; first and foremost, in the context of the Rome Statute, the right to a fair trial, a concept broadly perceived and applied, embracing the judicial process in its entirety. The Rome Statute itself makes evidence obtained in breach of internationally recognized human rights inadmissible in the circumstances specified by Article 69(7) of the Rome Statute. Where fair trial becomes impossible because of breaches of the fundamental rights of the suspect or the accused by his/her accusers, it would be a contradiction in terms to put the person on trial. Justice could not be done. A fair trial is the only means to do justice. If no fair trial can be held, the object of the judicial process is frustrated and the process must be stopped.'[35]

In accordance with the above Appeals Chamber's case law, the Rome Statute compels the organs of the ICC to interpret and apply all applicable law, regardless of its hierarchy, in accordance with international human rights and abiding to the principle of non-discrimination. Accordingly, internationally recognised human rights (though external sources of law) are not subject to a *lacuna* or gap in the statutory rules, but are to be applied as guiding principles in the application and interpretation of any internal or external source of law. Thus, as affirmed by Arsanjani, the language of Article 21(3) of the Rome Statute "is a sweeping language" which, as drafted, could apply to all three categories of applicable law under Article 21 of the Statute.[36] Furthermore, Bitti considers that internationally recognised human rights could be an additional source

34 *Lubanga case* 'Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the ICC pursuant to Article 19(2)(a) of the Statute of 3 October 2006' (14 December 2006) ICC-01/04 01/06-772, para. 38.

35 *Lubanga case* 'Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the ICC pursuant to Article 19(2)(a) of the Statute of 3 October 2006' (14 December 2006) ICC-01/04 01/06-772, para. 37.

36 M Arsanjani, 'The Rome Statute of the International Criminal Court' (1999) *American Journal of International Law*, para. 22.

of law as they could provide additional procedural remedies to participants in the proceedings that are not foreseen in the Rome Statute or the RPE.[37]

As to the definition of "internationally recognised human rights", it appears that ICC case law has given a broad meaning to Article 21(3) of the Rome Statute. In this regard, the ICC judges have included within this concept not only universally recognised human rights (*i.e.* CRC) but also regional human rights (*i.e.* referring to jurisprudence of the ECtHR and the IACtHR).[38] Hence, although international human rights treaties and case law (particularly from the ECtHR and the IACtHR) could fall under Article 21(1)(b) of the Rome Statute (treaties and principles and rules of international law), they could also be applied as "internationally recognised human rights" (under Article 21(3) of the Rome Statute).

This research will analyse all human rights instruments (including regional ones) under this scope, as this has significant impact in their applicability. While international treaties and principles in general apply subordinated to the statutory provisions and are only applicable when there is a *lacuna* in the Rome Statute, international human rights treaties and principles apply above all statutory provisions, acting as a *chapeau* to all provisions under the Rome Statute, the RPE and the Elements of Crime.

In conclusion, Article 21 of the Rome Statute grants judges the discretion (but also the obligation pursuant to paragraph 3 of this provision) to apply international children's rights instruments, established principles of international law, and international and regional case law related to children's rights in their judicial decisions. Accordingly, the ICC must adhere to internationally recognised human rights standards, particularly as regards the rights of the accused, but also in relation to the protection of victims and witnesses, pursuant to Articles 67 and 68 of the Rome Statute. If Article 21(3) of the Rome Statute is to be interpreted as a multiple *renvoi* giving rise to human rights obligations over and above customary ones, then the ICC is to be systematically bound by the highest among the relevant standards, as compliance with the latter would ensure that no internationally recognised human right is infringed.[39] As stated by Gradoni, such an obligation is a logical consequence of the *lex superior* status enjoyed by human rights standards within the legal system of the ICC. In fact, the author states that interpreting procedural rules

37 Gilbert Bitti, 'Article 21 of the Rome Statute of the International Criminal Court and the treatment of sources of law in the jurisprudence of the ICC' in: Carsten Stahn and Göran Sluiter (eds), *The Emerging Practice of the* International Criminal Court (Brill 2008).

38 Pre-Trial Chamber I of the ICC referred to jurisprudence of both regional courts of human rights in: *DRC Situation* 'Decision on the Prosecution's Application for Leave to Appeal the Chamber's Decision of 17 January 2006 on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6' (31 March 2006) ICC-01/04 135-tEN para. 115.

39 Lorenzo Gradoni in: Goran Sluiter and others (eds), *International Criminal Procedure, Principles and Rule*s (Oxford University Press 2013) 86.

in accordance with human rights law is, in essence, a conflict-avoidance technique.[40] In light of the diverse and sometimes conflicting case law among ICC Chambers, adherence to internationally recognised human rights should at least be the "common denominator" among all ICC decisions.[41]

However, since not all provisions children's rights treaties and particularly not all the findings of regional courts of human rights can be categorised under "internationally recognised human rights", they can still be of use for application and interpretation of the ICC provisions under the concept of "guidance" developed by the ICC Appeals Chamber analysed above.[42] Since the Appeals Chamber's criteria allows the use of other "soft law" human rights instruments under this condition of "guidance" for the interpretation and application of the law (insofar as they are not contrary to the Rome Statute), this research will thus refer to these soft law instruments in the present Chapter (*i.e.* the Paris Principles and the UN Guidelines on Child Victims and Witnesses of Crime (UN Guidelines)).[43]

Lastly, it is important to recognise that international human rights law and international criminal law, although intrinsically related, are not synonymous. As such, human rights instruments and the case law of human rights courts should be applied insofar as they do not violate fundamental principles of criminal law such as the principle of legality and the principle of non-retroactivity, enshrined in Articles 22, 23 and 24 of the Rome Statute. Although human rights law may be given a broad and liberal interpretation in order to achieve its objects and purposes, in international criminal law there are countervailing rights of the accused that are protected through principles strictly construed and ambiguity must be resolved in favour of the accused.[44]

40 Lorenzo Gradoni in: Goran Sluiter and others (eds), *International Criminal Procedure, Principles and Rule*s (Oxford University Press 2013) 93.

41 As noted by Cryer, although the ad-hoc tribunals have sometimes departed from strict adherence to human rights standards, the Rome Statute, on the other hand, contains provisions reflecting international human rights and directs that the Court must apply applicable treaties and the principles and rules of international law as sources of law. See: Robert Cryer and others, *An Introduction to International Criminal Law and Procedure* (Cambridge University Press, 2007) 354. Werle has also noted that the "limit" of international criminal law is given by human rights law, particularly as regards procedural rights of the accused. See: Gerhard Werle, *Tratado de Derecho Penal Internacional* (Tirant lo blanch tratados 2005) 101-102.

42 *Lubanga case* 'Judgment on the appeals of The Prosecutor and The Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008' (11 July 2008) ICC-01/04 01/06-1432, para. 33.

43 ECOSOC, *UN Economic and Social Council 2005/20: Guidelines on Justice in Matters Involving Child Victims and Witnesses of Crime* (UN Guidelines) (22 July 2005) E/RES/2005/20.

44 Robert Cryer and others, *An Introduction to International Criminal Law and Procedure* (Cambridge University Press, 2007) 10-11.

3.3 THE CRC

In relation to children's participation in ICC proceedings, the CRC is undoubtedly the starting point of any interpretation and application of the statutory provisions pursuant to internationally recognised children's human rights. Provisions such as Rule 86 of the RPE, which embraces the general principle on victims and witnesses before the ICC, should be read along with the CRC in order to properly identify and attend to the "needs" of child victims and witnesses before the ICC acknowledged in that Rule. After all, the CRC contains universally recognised human rights already included in the international covenants of human rights, but particularly referring to the specific needs and vulnerability of children not necessarily covered in these other general human rights treaties.[45] In the same manner, although the Rome Statute contains general provisions that apply equally to adults and children interacting with the ICC, the CRC is valuable when applying and interpreting these general ICC provisions to meet the specific needs of child witnesses and victims.

Moreover, the CRC is the most widely ratified United Nations treaty, with only the United States of America, Somalia and South Sudan not having ratified it. Therefore, all other member States of the UN have committed themselves to be bound by the CRC.[46] Likewise, for all but three UN State Parties, the CRC is binding and must be applied in good faith and these States have committed themselves to act pursuant to the CRC's objective and purpose.[47] As noted previously in this Chapter, although the ICC is an international organisation and thus not a State Party to the CRC, it is bound by internationally recognised human rights contained therein, pursuant to the unequivocal obligation provided in Article 21(3) of the Rome Statute.

However, not all provisions of the CRC may be automatically transposed to the ICC setting and others may be irrelevant for international criminal proceedings (*i.e.* Article 21 of the CRC related to adoptions). As regards other provisions that could be of relevance, they should still be interpreted and applied taking into consideration that they are to be used in international criminal proceedings, and with due regard to the rights of the accused. For example, Article 16 of the CRC related to a child's rights to privacy may be applicable when determining protective measures for a child witness (for example when ordering that his or her testimony be given in closed session so as to grant the witness anonymity vis-à-vis the public). However, this same

45 Sharon Detrick, *A commentary on the United Nations Convention on the Rights of the Child* (Martinus Nijhoff Publishers 1999) 2-4.

46 Pursuant to the Vienna Convention the "ratification" is the international act whereby a State accepts to be bound by a treaty, United Nations, *Vienna Convention on the Law of Treaties* (23 May 1969) UN *Treaty Series*, vol 1155 p 331 (Vienna Convention) articles 2(1)(b) and 11.

47 Vienna Convention, article 18 and article 26 contain the principle of "*pacta sunt servanda*".

CRC provision should be balanced with other "competing" human rights of the accused, including his or her right to a public hearing.

Although one could argue that not all of the provisions in the CRC are "internationally recognised human rights",[48] this research will interpret children's rights enshrined in the CRC as indivisible, interrelated and of equal importance.[49] As noted by Detrick, each individual right contained in the CRC is fundamental to the dignity of the child and implementation of each right should take into account the implementation of or respect for all other rights.[50] Hence, it can be concluded that the CRC, in its entirety, as an almost universally ratified treaty, is to be considered as "internationally recognised human rights" pursuant to Article 21(3) of the Rome Statute. Nonetheless, this Chapter will refer to the most relevant provisions of the CRC vis-á-vis ICC proceedings.

The Rome Statute contains no definition of "child". The only provision that refers to age is Article 26 of the Rome Statute, which limits the jurisdiction of the ICC to persons who are 18 years old. On the other hand, Articles 8(2)(b)(xxvi) and (e)(vii) define the crime of child recruitment and establishes an age limit of 15 years. In this sense, *Article 1 of the CRC* provides a clear definition of the child that should be applicable when interpreting ICC provisions that refer to child victims or witnesses before the ICC. In this sense, a child should mean "every human being under the age of eighteen years unless, under the law applicable to the child, majority is attained earlier".

However, the age of 18 should not be set in stone. As noted by Drumbl, one should not overlook other articles of the CRC, such as Article 5, which recognises the "evolving capacities" of children, or Article 12 of the CRC, which establishes that the view of children should be considered in accordance with the child's "age and maturity".[51] In this sense, although a "child" strictly applying the CRC means a person under the age of 18, the end of childhood could also correspond to the relevant social and cultural conditions of a child

48 For example, those CRC provisions that have been subject of reservations by many State Parties to the CRC, such as the duty to respect the right of the child to freedom of thought, conscience and religion (article 14 of the CRC).

49 UNGA, *Vienna Declaration and Programme of Action* (12 July 1993) A/CONF.157/23, para. 5. See also: Sharon Detrick, *A commentary on the United Nations Convention on the Rights of the Child* (Martinus Nijhoff Publishers 1999) 22.

50 Sharon Detrick, *A commentary on the United Nations Convention on the Rights of the Child* (Martinus Nijhoff Publishers 1999) 22.

51 For a critique as to the "universal childhood" established by the law of the CRC see Mark Drumbl, *Reimagining Child Soldiers in International Law and Policy* (Oxford University Press 2012) 44-50. See also: Beijer and Liefaard, 'A Bermuda Triangle? Balancing protection, participation and proof in criminal proceedings affecting child victims and witnesses' (2011) *Utrecht Law Review*, p. 70-106.

(as long as the age of majority is not set unreasonably low or contrary to the provisions, aims and objectives of the CRC).[52]

Thus far, the ICC Chambers have established that victims under 18 years of age are to be considered children. However, applicant victims who were not yet 18 but were close thereto were allowed to participate in proceedings without parental authorisation.[53] Likewise, as will be analysed in Chapter 5 of this research, witnesses who were already 18 when they appear in court but were under 18 at the time of the crimes could still be considered as "child witnesses" at the time of their testimony.

Articles 2, 3, 6 and 12 of the CRC are the core and basic general principles that should be read in combination with other CRC provisions and in general any other applicable law in cases involving children.[54] Any international criminal procedure in which children are either participating as witnesses or victims is bound by these four basic principles: non-discrimination, best interests of the child, child's right to life, survival and development, and the child's right to participate in matters concerning him/her.[55]

Article 2 of the CRC provides a definition of the principle of non-discrimination particularly relevant to children. Although the principle of non-discrimination is provided for in Article 21(3) of the Rome Statute, the CRC's definition could be helpful in order to apply the Rome Statute's principle to the particular conditions of children appearing before the ICC. In this regard, in addition to the grounds of discrimination included in the Rome Statute, grounds such as the "parent's or legal guardian's race" and "disability", included in Article 2 of the CRC, could be referred to in ICC proceedings.

Article 3 of the CRC is without a doubt the guiding principle of all interpretation and application of law involving a child, and thus is applicable to situations in which a child is a victim or witness before the ICC. Article 3(1) of the CRC recognises the following:

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52 Sharon Detrick, *A commentary on the United Nations Convention on the Rights of the Child* (Martinus Nijhoff Publishers 1999) 52 and 60.

53 *Lubanga case* 'Decision on the applications by victims to participate in the proceedings' (16 December 2008) ICC-01/04-01/06-1556, para. 78.

54 It is important to observe that many CRC State Parties have made reservations to Article 2 of the CRC. However, considering that article 21(3) of the Rome Statute already contains the principle of non-discrimination, the use of Article 2 of the CRC could be limited in the ICC context. As for articles 3 and 6 of the CRC, a very limited number of States have made reservations. Luxemburg has made a reservation in relation to article 3 of the CRC and China, Luxembourg and Tunisia have made reservations to article 6 of the CRC. No State Party to the CRC has made any reservation vis-à-vis article 12 of the CRC. Information available at: <http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en> accessed 8 August 2013.

55 CRC Committee, *General comment No. 5 (2003): General measures of implementation of the Convention on the Rights of the Child* (27 November 2003) CRC/GC/2003/5, para. 12.

> 'In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration'.

In light of this provision, the judges, prosecutors, investigators and other members of the ICC should take into consideration the best interests of the child when fulfilling their mandate as regards child witnesses or victims appearing before the ICC, as well as children that could be indirectly affected by ICC proceedings (*i.e.* as a result of the testimony of a parent that needs to be relocated).

Though this principle has been broadly applied both nationally and internationally, it is difficult to define its concrete content because it is an open provision left to the interpretation of the judge, investigator or other Court official applying it. Some commentators to the CRC have stated that the child's best interests is not a single and definite concept, but that it should be defined taking into consideration the child's own views, thus including other rights of the child enshrined in the CRC, such as the right to be heard (Article 12 of the CRC). Others have referred to the child's best interests as a principle that must be defined with due regard to the cultural and social situation of the child.[56] This must be done, however, balancing cultural sensitivity with the child's basic rights. In other words, cultural, traditional or religious practices cannot override children's fundamental human rights.

The CRC Committee has stated that the child's best interests is a threefold concept. Firstly, it is a substantive right of the child to have his or her best interests assessed and taken as primary consideration when different interests are at stake. It is also a fundamental interpretative legal principle, meaning that if a legal provision is open to more than one interpretation, the interpretation which most effectively serves the child's best interests should be chosen. Thirdly, it is a rule of procedure that establishes that whenever a decision is to be made that will affect a specific child or a group of children or children in general,, the decision-making process must include an evaluation of the possible impact of the decision on the child or children concerned.[57]

Though Freeman has affirmed that the concept of best interests of the child is indeterminate, he quotes the following definition by Eekelaar as one of the best attempts to define it:

56 Sharon Detrick, *A commentary on the United Nations Convention on the Rights of the Child* (Martinus Nijhoff Publishers 1999) 89.

57 CRC Committee, *General comment No. 14 (2013): The right of the child to have his or her best interests taken as a primary consideration* (29 May 2013) CRC/C/GC/14, para. 6.

> 'Basic interests, for example to physical, emotional and intellectual care development interests, to enter adulthood as far as possible without disadvantage and autonomy interests, especially the freedom to choose a lifestyle of their own.'[58]

In light of the ICC's international character, and the diversity of children that will come before it, it seems logical to adopt an approach that takes into account that different societies and different historical periods will give a different definition to this principle. However, no interpretation shall ever be contrary to the purpose and objective of the CRC and the Rome Statute (including the rights of the accused).

Alston and Parker have distinguished three objectives within Article 3 of the CRC.[59] These objectives could be applicable to the ICC's objectives in regards to child victims or witnesses before the ICC.

The first role for Article 3 of the CRC is identified as one of supporting, justifying and clarifying a particular approach to issues arising in regards to children's rights. Applied to the ICC's scenario, the best interests of the child could be applicable when a Trial Chamber decides, for example, on a reparations order. In application of the principle of best interests of the child, the Chamber should take children into account when ordering reparations, because reparation measures could have a long-time effect in their future development (*i.e.* rehabilitation and reintegration programmes aimed for child victims vis-à-vis pecuniary compensation for the parents).[60]

The second role of Article 3 of the CRC is to act as a mediating principle that can assist in resolving conflicts between rights where these arise within the overall framework of the CRC (or the Rome Statute). For example, the principle of the child's best interests could justify anonymity of a child victim (right to protection) vis-à-vis the rights of the accused to know the victim's identity in an ICC trial.

Thirdly, Article 3 of the CRC is the basis for evaluating the laws and practices where the matter is not governed by positive rights in the CRC (or the Rome Statute for ICC purposes). For example, the Rome Statute has a *lacuna* regarding the concept of children, and leaves somewhat unprotected child soldiers above the age of 15, who are neither regarded as victims or as perpetrators under the Rome Statute. Under the principle of the child's best interests, although an accused cannot be charged with the crime of child recruitment of children above the age of 15, these children could still be considered beneficiaries of reparation programmes implemented by the TFV in the broader scope of "victims of a situation" although not victims of a given

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58 Michael Freeman, *Article 3: The Best Interests of the Child* (Vol. 3 Commentary on the United Nations Convention on the Rights of the Child, Martinus Nijhoff Publishers, 2007) 27.

59 Michael Freeman, *Article 3: The Best Interests of the Child* (Vol. 3 Commentary on the United Nations Convention on the Rights of the Child, Martinus Nijhoff Publishers, 2007) 32.

60 Reparations for child victims are analysed further in Chapter 5.

case covering crimes of child recruitment. This could be possible since the Trust for Victims has a more general assistance mandate that is not limited to specific charges brought against an accused person, but may address the broader needs of victims of other crimes not included in specific charges in Situations referred to the ICC.[61] However, such an interpretation would be contrary to the rights of the accused if reparations would be ordered against a convicted person (strictly bound by the charges and the subsequent conviction). Thus, a balance must be struck between existing (and sometimes conflicting) rights of child victims and witnesses and the accused person.

Article 6 provides for the child's inherent right to life and the subsequent obligation to ensure to the maximum extent possible survival and development of the child. The CRC Committee has interpreted "development" in a broader sense, including the child's physical, mental, spiritual, moral, psychological and social development.[62] This provision, although very general in scope, could still serve as guidance when deciding on protective measures for a child victim or witness, including his or her relocation to a place where the child victim or witness can develop (*i.e.* for example, taking into consideration language and schooling possibilities).

Another provision that is fundamental in the practice of the ICC is *Article 12 of the CRC*, which establishes the right of children to present their views in matters that affect them. Regarding the ICC, Article 12 could be applicable in order to give children the opportunity to express their views and concerns as victims under Article 68(3) of the Rome Statute, and thus participate in ICC proceedings. Rule 87 of the RPE, which states that when deciding on protective measures for witnesses or victims the Chamber shall seek to obtain the consent of the person concerned, should also be read in unison with Article 12 of the CRC, when such measures concern children. Hence, when the victim wishing to express his or her views and concerns (pursuant to Article 68(3) of the Rome Statute) is a child, or when the witness or victim for whom protective or special measures are sought is a child (pursuant to Article 68(1) of the Statute and Rules 87 and 88 of the RPE), Article 12 of the CRC should offer guidance in the interpretation of the relevant ICC provisions.

The CRC Committee has stated that although the term "participation" does not appear in the CRC, it has evolved and is now widely used to describe "on-going processes, which include information-sharing and dialogue between children and adults based on mutual respect, and in which children can learn how their views and those of the adults are taken into account and shape the

61 ICC Assembly of States Parties, *Regulations of the Trust Fund for Victims* (3 December 2005) ICC-ASP/4/Res.3 (RTFV) Regulations 47 and 48.

62 CRC Committee, *General Comment No. 12 (2009): The right of the child to be heard* (20 July 2009) CRC/C/GC/12, para. 12.

outcome of such processes".[63] Considering that criminal proceedings before the ICC are a process that lasts several years, not only for the conviction of those responsible, but also to achieve reparations for victims, the above definition of "participation" could be adopted for ICC proceedings as regards child victims and witnesses. It is important to note that in light of the duration and complexity of ICC proceedings, participation of children should not be regarded as a one-time event, but should be seen as a process. Although the ICC is limited to its jurisdiction and the charges brought against an accused person, other areas of the ICC proceedings (i.e. reparations) could be seen as a more elaborate process in which an exchange between child victims and the ICC to develop reparations that are relevant to the children's lives.[64] In this sense, the CRC Committee affirmed that Article 12 is not only about listening to children, but also about seriously considering their views.[65] As it will be further analysed in Chapter 5, it is not only about granting children the status to participate as victims in trial proceedings before the ICC, but in actually making their participation an effective and significant one in which their views and concerns will be heard and taken into account, not only for the determination of guilt or innocence of accused persons, but also for sentencing purposes and reparation measures.

As already stated in Chapter 1 of this research, child victims or witnesses participating in ICC proceedings could have a level of maturity superior to that of children their age given their experiences in an armed conflict or in situations where crimes against humanity and genocide are committed. In this sense, Article 12 of the CRC, read with the interpretation of the age of children analysed above, establishes that the views of the child shall be given due weight in accordance with age and maturity of the child, and therefore no strict age limit must be imposed to determine whether a child is old enough to participate in ICC proceedings.[66] For example, even though a child may still be subject to parental guardianship for reasons of age, he or she could be in a position to express his or her own views and concerns, sometimes even contrary to that of his/her parents or guardian, given, for example, that the child lived without parental supervision for a number of years, or even was subject to "marriage" while in recruitment as a child soldier. The CRC Committee stated that capacity of children must be presumed and thus children

63 CRC Committee, *General Comment No. 12 (2009): The right of the child to be heard* (20 July 2009) CRC/C/GC/12, para. 3.

64 CRC Committee, *General Comment No. 12 (2009): The right of the child to be heard* (20 July 2009) CRC/C/GC/12, para. 13.

65 CRC Committee, *General Comment No. 12 (2009): The right of the child to be heard* (20 July 2009) CRC/C/GC/12, para. 28.

66 CRC Committee, *General Comment No. 12 (2009): The right of the child to be heard* (20 July 2009) CRC/C/GC/12, paras 21 and 29-30.

wishing to participate should not have the burden to prove their capacity.[67] As will be analysed in Chapter 5 below, the ICC case law has been inconsistent in this regard, with some ICC decisions imposing strict 18 years of age limits to victims' participation without parental or guardian authorisation, while other decisions have authorised children to participate without adult authorisation.

Pursuant to Article 12 of the CRC, the child shall be provided the right to be heard, either directly or indirectly, or through a representative or an appropriate body. This is of particular importance regarding children, since organs of the ICC will have to verify on a case-by-case basis, whether it is appropriate for a child to appear directly before the ICC or through a representative. This, as will be analysed further in Chapter 5, is of relevance when the ICC judges decide on common legal representation for child victims or when the ICC needs to appoint a counsel for child witnesses that could give self-incriminatory testimony.

A balance must be struck when applying Article 12 of the CRC, between the empowerment of children on one hand (allowing their participation in judicial proceedings) and their vulnerability on the other (guaranteeing their protection against re-victimisation).[68] Often, a child appearing before the ICC will be both a vulnerable person but also an empowered individual. The ICC, including its judges, prosecutors and lawyers, as well as support staff of the VWU, will have to guarantee that the child's voice is heard, while at the same time protecting the child's well-being and dignity. Importantly, measures should be taken by the ICC under Rule 86 of the RPE in order to assure that the judicial environment in which children participate is not intimidating, hostile, insensitive or inappropriate for them, with child-friendly information, support and staff, as well as courtrooms, judges and lawyers.[69] For example, as will be analysed further in Chapter 5 of this research, the testimony of child witnesses could be recorded to be presented in trial *in lieu* of live testimony or judges could adopt protocols to safeguard the rights of child witnesses during examination and cross-examination, while still guaranteeing the rights of a fair trial for the accused.

Article 12 of the CRC should also be read taking into account the child's consent. In this sense, the ICC should involve children in their proceedings as long as they wish to do so, particularly since contrary to other criminal

67 CRC Committee, *General Comment No. 12 (2009): The right of the child to be heard* (20 July 2009) CRC/C/GC/12, para. 20.

68 Beijer and Liefaard, 'A Bermuda Triangle? Balancing protection, participation and proof in criminal proceedings affecting child victims and witnesses' (2011) *Utrecht Law Review,* 75.

69 CRC Committee, *General Comment No. 12 (2009): The right of the child to be heard* (20 July 2009) CRC/C/GC/12, para. 34.

tribunals, the ICC does not have the power to *subpoena* witnesses, but can only call witnesses as long as they wish to cooperate with the ICC.[70]

In accordance with Detrick, Article 12 of the CRC encompasses the obligation to assure the child the right to freedom of expressing his or her views and the right to say what he or she pleases without interference and to choose whether to express his or her views or not.[71] Within the context of the ICC, it is important for the ICC's organs to verify the child's consent, for example when deciding upon an application for victim's participation submitted by a parent or guardian acting on behalf of a child victim. As stated by the CRC Committee, a child has the right not to exercise his or her right to be heard, as this is a choice, not an obligation.[72] Likewise, consent of a child has to be informed and free of any coercion or manipulation.[73] This is particularly important since children could be "used" by adults wishing to gain something from their participation in the ICC (*i.e.* funding as intermediaries or legal representatives or reparations as parents of victims). Although the ICC cannot compel anyone, be it a child or an adult, to testify in court, other external factors (*i.e.* protection or financial assistance) could compel a child to testify before the ICC or to submit an application to participate as victim in ICC proceedings. As already mentioned in the Introduction of this research, and as will be further studied in Chapter 5, this lack of information or proper consent could have been an issue as regards former child soldier witnesses who allegedly were corrupted by intermediaries.

The CRC Committee identified five steps that need to be taken in order to implement a child's right to be heard. These five steps could very well be adapted to ICC proceedings. Firstly, there needs to be preparation, meaning that the child needs to be informed of his or her rights in the judicial proceedings, including the right to have a legal representative, in a language and manner that he or she understands.[74] Second, if the child wishes to participate

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70 See: *Ruto and Sang case* 'Victims and Witnesses Unit's Amended Protocol on the practices used to familiarise witnesses for giving testimony' (25 April 2013) ICC-01/09-01/11-704-Anx, para. 10. This protocol indicates that: "The VWU will only be able to arrange the witness' availability for testimony as long as the individual consents to appear as a witness". See also: Goran Sluiter, *Appearance of Witnesses and Unavailability of Subpoena Powers for the Court*, in Roberto Belleli (ed), *International Criminal Justice, Law and Practice from the Rome Statute to its Review* (Ashgate 2010), 459-472.

71 Sharon Detrick, *A commentary on the United Nations Convention on the Rights of the Child* (Martinus Nijhoff Publishers 1999) 221.

72 CRC Committee, *General Comment No. 12 (2009): The right of the child to be heard* (20 July 2009) CRC/C/GC/12, para. 16.

73 CRC Committee, *General Comment No. 12 (2009): The right of the child to be heard* (20 July 2009) CRC/C/GC/12, para. 22.

74 It is to be observed that the ICC's Chambers had prohibited witness proofing in the Lubanga, Bemba and Katanga and Ngudjolo cases. However, recently in the Kenya Situation cases, the Trial Chamber has allowed once again this practice. This is analysed further in Chapter 5.

in person in a hearing, this should be an enabling and encouraging experience, which should have a more informal format and should be done under conditions of confidentiality. In this regard, it is important to balance the child's rights with the rights of the accused person, particularly taking into consideration that Article 68(3) of the Rome Statute states that victims' participation should be appropriate and with due regard to the rights of the accused and a fair trial. Thirdly, the child's views must be given due weight in accordance with his or her capacity, on a case-by-case basis. In this sense, as noted above, the child's maturity should be determined individually and general age limitations should be avoided. Fourth, the child has to be informed of the outcome of the process and explain how his or her views were considered. Considering the different phases of the ICC proceedings and their duration, information should be adapted to the child's development and age, throughout the length of the proceedings. Finally, children must have at their disposition procedures to present complaints and remedies when their right to be heard is disregarded or violated.[75] In the ICC there are currently no complaints systems in place. Moreover, the ECtHR recently dismissed an application by an ICC witness, alleging that his rights had been violated in The Netherlands as a result of his participation as a witness in ICC proceedings. The ECtHR determined that although in Dutch territory, the witness was subject to ICC jurisdiction.[76] Consequently, an ICC internal complaint system for victims and witnesses could be put in place. Moreover, Article 70 investigations could be open and individuals charged and convicted, when crimes against the administration are committed (*i.e.* inducing a child witness to give false testimony).

The CRC Committee has enumerated nine requirements for all processes in which a child or children are heard and participate.[77] These also could be applicable to ICC proceedings and have been taken into consideration in the analysis in Chapter 5 of this research. Taking into consideration the recommendations of the CRC Committee,[78] participation of children in the ICC, either as victims or witnesses should aim to be:

a) *Transparent and informative*: children must be provided with full, accessible information. Outreach carried out by the ICC as well as the information given to child victims by legal representatives, ICC investigators and

75 CRC Committee, *General Comment No. 12 (2009): The right of the child to be heard* (20 July 2009) CRC/C/GC/12, paras 40-47.

76 ECtHR, *Bede Djokaba Lambi Longa v Netherlands,* Application no 33917/12, Admissibility Decision, (9 October 2012). See also: International Bar Association, *Witnesses before the International Criminal Cour*t, July 2013, pages 51-54.

77 The application of Article 12 of the CRC to ICC proceedings in which child victims and witnesses participate is analysed in-depth in Chapter 5 below.

78 CRC Committee, *General Comment No. 12 (2009): The right of the child to be heard* (20 July 2009) CRC/C/GC/12, para. 134.

Registry staff should consider the need to inform children in a language and manner they understand.[79]

b) *Voluntary*: children must never be coerced to present their views. The voluntariness needs to be ascertained beyond a simple "yes" or "no", in order to disregard any undue pressure that could be exercised upon the child to participate in ICC proceedings (including by parents and legal guardians).
c) *Respectful*: children's views must be treated with respect, understanding the context of each child's life. In this regard, child witnesses should not be subject to strenuous examination and cross-examination (albeit with due regard to the rights of the accused) and their "views and concerns" pursuant to Article 68(3) of the Rome Statute should be taken into consideration (albeit not for purposes of a conviction, they could be considered for sentencing and reparations purposes).
d) *Relevant*: issues must be of real relevance for the lives of children. As noted above, particularly as regards reparations, these should be relevant and adequate to the child's needs (see also Rule 86 of the RPE).
e) *Child-friendly*: judicial proceedings must be adapted to children's capacity and need for support. Although general decisions and policies could be taken as regards the general obligation of the ICC to protect child victims and witnesses, support should be tailored and adapted to the needs of a particular Situation or case before the ICC and the particular needs of a child (*i.e.* when deciding on witness relocation, language and cultural needs of children should be taken into consideration).
f) *Inclusive*: participation must avoid discrimination and encourage opportunities for different groups of children. In situation countries where certain types of children may be discriminated (*i.e.* girls or indigenous children), the ICC may have to adopt affirmative action mechanisms to have these groups of children represented, when this is possible within the ICC's jurisdiction and in due regard to other competing objectives of the ICC (*i.e.* expeditiousness of proceedings).[80]

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79 Article 17 of the CRC, on the rights of children to access information, is also relevant. The ICC should make an effort to reach child victims and witnesses through dissemination of information that is child-friendly so that children can take an informed decision as to their participation in ICC proceedings. As stated in this provision, this dissemination of information should be done taking into account different cultural and linguistic needs of children participating as victims and witnesses before the ICC.

80 Article 23 and Article 30 of the CRC, which refer to the rights of children with disabilities and children of ethnic, religious and linguistic minorities, should also be taken into consideration. In accordance with these two provisions, when implementing child-sensitive measures, the organs of the ICC should not only take into consideration children as a group that needs special protection, but also take into account the particular needs and condition of children with disabilities and children coming from different ethnic or cultural backgrounds. In fact, in accordance with the principle of non-discrimination, these guarantees should not only apply to children, but to all witnesses and victims before the ICC.

g) *Supported by training*: adults working with children need preparation, skills and support. From ICC judges to intermediaries working in the field, adults working with child victims and witnesses in ICC proceedings should be trained in order to meet the ICC's obligations pursuant to Rule 86 of the RPE.
h) *Safe and sensitive to risk*: precautions to minimize risks to violence and exploitation must be taken. This is intrinsically related to requirement b) above on voluntariness. The ICC should adopt safeguards to guarantee that children's decision to participate in ICC proceedings is voluntary and also duly informed of possible risks.
i) *Accountable*: provide feedback to children, monitoring and evaluation of their participation needs to be undertaken. As noted above, a monitoring and even a complaint system could be put in place to make sure that the ICC meets these international children's rights standards.

Other CRC provisions are also relevant to ICC proceedings. For example, as will be further analysed in Chapter 4 of this research, *Article 38 of the CRC*, which prohibits child recruitment under the age of fifteen, could be seen as the predecessor of the crimes of child recruitment as provided for in Article 8 of the Rome Statute. As a result, the discussions around the adoption of this provision of the CRC and its interpretation by the CRC Committee could be useful tools for judges of the ICC when interpreting the Rome Statute's definition of child recruitment. However, it is important to take notice that the Rome Statute's concept of child recruitment goes beyond the CRC. While the CRC prohibits the use of children to take direct part in hostilities, the Rome Statute provides a broader concept of actively participating in hostilities, thus lowering the threshold of the crime to both direct and indirect participation in combat.

Another relevant provision is *Article 39 of the CRC*, on the recovery and social reintegration of victims of child recruitment. It is thus a valuable that could be considered when judges decide on reparations orders for child victims of crimes.[81]

The CRC thus gives the general framework on "internationally recognised human rights" as regards children in ICC proceedings. However, because of its general scope, sometimes its provisions may lack real guidance to particular cases in which child victims and witnesses are involved in ICC proceedings.

81 In accordance with the CRC Committee, measures under this provision include, *inter alia*: a) policies and programmes, including at family and community levels, to address physical and psychological effects of conflicts on children and to promote their reintegration in society; b) demobilisation of child soldiers and to prepare them to actively and responsibly participate and in society; c) education and vocational training; and d) surveys and research on the matter. See: CRC Committee, *General Guidelines regarding the Form and Contents of Periodic Reports to be Submitted by State Parties under Article 44, para. 1(b) of the Convention* (Adopted by the Committee at its 343rd meeting, 11 October 1996) CRC/C758 para. 130.

Thus, the CRC Committee's General Comments or other more specific international children's rights instruments (*i.e.* such as the UN Guidelines analysed below) may have a more practical use in ICC proceedings. However, for the determination of principles in which the ICC practice is to be founded, the CRC is undoubtedly the starting point when dealing with child victims and witnesses in the ICC.

As regards the *Optional Protocol to the CRC on the involvement of children in armed conflict*,[82] this international instrument has limited applicability regarding the ICC's jurisdiction because the Rome Statute prohibits child recruitment under the age of 15, while the Optional Protocol to the CRC rises the age of prohibition of child recruitment to 18 years. Though the ICC has no jurisdiction to prosecute an individual for recruiting children under 18, the fact that a State is prosecuting under this higher standard could be important in application of the principle of complementarity.[83]

The *Optional Protocol to the CRC on the sale of children, child prostitution and child pornography*,[84] could be of use to define existing crimes under the Rome Statute. For example, the concept of "child prostitution" could be used to define the crime against humanity of "enforced prostitution" (Article 7(1)(g) of the Rome Statute) when committed particularly against children. Likewise, under Article 7(1)(g) of the Rome Statute the concept of "child pornography" could encompass a crime against humanity under the wider conduct of "any other form of sexual violence of comparable gravity". Finally, the concept of "sale of children" could be of use to define the crime of enslavement and sexual slavery included in Article 7(1)(c) and 7(1)(g) of the Rome Statute. Furthermore, in accordance with Article 8 of the Optional Protocol on the sale of children, child prostitution and child pornography, the ICC could adopt measures included therein, which aim to protect the rights and interests of child victims at all stages of the criminal justice process and could be applied in ICC proceedings.

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82 UNGA, *Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict* (25 May 2000, entry into force on 12 February 2002) A/RES/54/263.

83 The Optional Protocol on children and armed conflict, which has also been ratified by some State Parties to the Rome Statute, goes beyond the Rome Statute's standard of protection, including within the scope of the prohibition of child recruitment, any person under 18 years of age. Thus, the State Parties to the Rome Statute that have also ratified the Optional Protocol on children and armed conflict could investigate and prosecute within their jurisdiction the recruitment of children between 15 and 18 years of age or include these children in national reparation or reintegration programmes. For example demobilisation efforts of children in a State Party to the ICC who has also ratified the Optional Protocol on children and armed conflict could include all children under 18, thus corresponding to the Optional Protocol's standard of 18 years and by doing so, close the gap of the Rome Statute as regards children older than 15 and younger than 18 years.

84 UNGA, *Optional Protocol to the Convention on the Rights of the Child on the Sale of Children: Child Prostitution and Child Pornography* (25 May 2000, entry into force on 18 January 2002) A/RES/54/263.

Finally, the *Optional Protocol to the CRC on a Communications Procedure*,[85] which creates a procedure by which individuals or groups of individuals may submit complaints before the CRC Committee, could complement the ICC's jurisdiction, since it could address State responsibility for violations of human rights encompassing crimes committed against children. This mechanism could also complement ICC's jurisdiction when judicial proceedings may not be possible (*i.e.* due to lack of evidence connecting crimes to specific individuals) or when the ICC lacks jurisdiction (*i.e.* crimes occur in the territory of a non-State party).

3.4 Applicability of other international instruments

Apart from the CRC, other international instruments may also be applied in ICC proceedings, pursuant to Article 21 of the Rome Statute. Some of these instruments, analysed in the present section, may be applicable pursuant to Article 21(3) of the Rome Statute as internationally recognised human rights,[86] whereas other instruments may only be applicable if a *lacuna* exists in the Statute, as subsidiary sources of law analysed above. Moreover, other "soft law" instruments, although no applicable *per se*, could serve of "guidance" to interpret existing ICC provisions.

3.4.1 International Humanitarian Law Instruments

As noted above, international criminal law developed as a response to violations of international humanitarian law and international human rights law. Evidently thus, instruments of international humanitarian law are helpful sources of law for the interpretation of crimes within ICC's jurisdiction that are violations to it, namely war crimes.

As regards children in armed conflict, although international humanitarian law provides for their protection, it mainly focuses on their position as civilians and non-combatants and does not address protection and rehabilitation of

85 UN Human Rights Council, *Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure: resolution adopted by the Human Rights Council* (14 July 2011) A/HRC/RES/17/18, opened for signature on 28 February 2012.

86 A relevant international instrument, which has been ratified by 161 countries, is the International Labour Organisation (ILO) Convention 182. The ILO Convention 182 could be a helpful tool when considering not only child recruitment to participate in armed conflict, but also other crimes committed against children, often within the broader context of child recruitment (*i.e.* sexual slavery).

children participating in armed conflict.[87] However, while the Geneva Conventions refer only to children as civilians and do not include in their provisions any reference to children as participants in armed conflict, the Optional Protocols prohibit recruitment of child soldiers and thus crystallised for the first time in history the principle of international humanitarian law that prohibits participation of children in armed conflict. However, the Optional Protocols rule out actual child recruitment (as it only refers to its prohibition and prevention), and therefore do not offer any guidance regarding the protection and rehabilitation of children that ultimately become victims of child recruitment in international and non-international armed conflicts. In other words, the Optional Protocols assume that State Parties will not recruit children, and thus omit any reference as to possible solutions when child recruitment ultimately occurs, including the investigation, prosecution and punishment of those responsible for recruiting children in armed groups or forces.

Notwithstanding its limitations, in accordance with Article 21(1)(b) of the Rome Statute, international humanitarian law could still be useful to define the elements of war crimes under Article 8 of the Rome Statute. Since many of the crimes included in Article 8 derive from international humanitarian law instruments, the definition of terms such as "civilian population", "military necessity", "civilian objects" could be found in international humanitarian law instruments. Moreover, as will be studied in Chapter 4 below, international humanitarian law is useful to interpret the crimes of enlistment, conscription and use of children under the age of fifteen to participate actively in the hostilities.

3.4.2 The Paris Principles

In 1997, the Cape Town Principles were adopted during a symposium organised by UNICEF and the NGO Working Group on the CRC.[88] As a result of this global review initiated by UNICEF, ten years after the adoption of the Cape Town Principles, the Paris Principles were adopted.[89] This instrument consolidated the accumulated knowledge of a decade-long experience, particularly taking into consideration advances in international law regarding child recruitment, among them the adoption of the Rome Statute and the juris-

87 Alison Dundes Renteln, 'The Child Soldier: The Challenge of Enforcing International Standards' Sixteenth Annual International Law Symposium "Rights of Children in the New Millennium" (Fall 1999) *Whittier Law Review*, 193.

88 Paris Principles, 4.

89 Drumbl states that the Cape Town and Paris Principles, along with the 1996 Machel Report, are the "most influential among formally non-binding documents concerned with the legal permissible age of association with armed forces or groups", Mark Drumbl, *Reimagining Child Soldiers in International Law and Policy* (Oxford University Press 2012) 140.

prudence of the first cases in the SCSL. Most importantly, States endorsed the Paris Principles in a ministerial meeting held in Paris in February 2007.[90] Thus, as noted by Drumbl, although a soft law and hence non-binding instrument, the Paris Principles have obtained widespread professional, operation and political currency.[91]

Even if the Paris Principles are not considered as "internationally recognised human rights", and therefore not applicable law in accordance with the strict sense of Article 21(3) of the Rome Statute, these principles could serve as "guidance" for the Chambers and other organs of the ICC in the interpretation and application of relevant provisions of the Rome Statute. In this sense, as will be analysed further in Chapter 4, the Paris Principles could for instance provide guidance in defining the concept of children "used to participate actively in hostilities" under Article 8(2)(b)(xxvi) and 8(2)(e)(vii) of the Rome Statute so as to guarantee the maximum degree of protection.

Given that the Paris Principles also provide a course of action in the implementation of strategies to prevent child recruitment, protect children from recruitment and facilitate their reintegration and rehabilitation, they may well be useful in fulfilling the objectives and purposes of the ICC as regards children, not only in respect of the ICC's mandate to investigate and prosecute those responsible for these crimes, but also the ICC's objective to provide reparations to victims of these crimes. The applicability of the Paris Principles in this regard is further analysed in Chapter 5 below.

The fact that the Paris Principles are based on "lessons learned" in the decade after the adoption of the Cape Town Principles, should be of significance when the ICC deals with child victims and witnesses of crimes of child recruitment, but could also be useful when dealing in general with children in armed conflict situations in which the ICC has jurisdiction.[92] The Paris Principles must nevertheless be understood within the limited scope and

90 Paris Principles, 5. As of September 2010, the number of states endorsing the Paris Principles had reached 95. See: Mark Drumbl, *Reimagining Child Soldiers in International Law and Policy* (Oxford University Press 2012) 111.

91 Mark Drumbl, *Reimagining Child Soldiers in International Law and Policy* (Oxford University Press 2012) 3.

92 For this purpose, the ICC could take into account the following concerns identified in the Paris Principles (Principle 1.7): The precise nature of the problem and the solution will vary according to the context. A situation analysis, including a gender analysis, should inform and guide all interventions; Any solution should address the needs of all children affected by armed conflict and incorporate activities to develop and support local capacity to provide a protective environment for children; The protective environment should incorporate measures to prevent discrimination against girls whose use in armed conflicts is pervasive yet often unrecognised and to promote their equal status in society; A long term commitment by all actors to prevent the unlawful recruitment or use of children, promote their release from armed forces or armed groups, protect them and support their reintegration is essential; The family including the extended family and clan and the community should be actively incorporated in the development and implementation of interventions and activities, and they in turn should participate in finding solutions.

jurisdiction of the ICC, and its interaction with other stakeholders in the broader concept of international justice and transitional justice. In this sense, the ICC must fulfil its mandate to investigate and prosecute crimes, and order reparations for victims of crimes, including those committed against children. However, many other goals of the Paris Principles should be fulfilled by other actors, such as States, NGOs, other international organisations (*i.e.* UN, African Union), and grass-roots organisations.

As already mentioned in Chapter 1 of this research, the Paris Principles provide a comprehensive and inclusive definition of child recruitment as "children associated with an armed force or group". This concept incorporates not only children that have been formally recruited, trained, and used as combatants, but also includes children that have been recruited in any capacity and are thus involved with the armed force or group in a way that he or she is in danger. Thus, as will be further analysed in Chapter 5, the Paris Principles definition is paramount in order to guarantee that certain groups of children (and particularly girls) recruited as cooks, porters, messengers, spies or for sexual purposes, are also able to participate as victims in ICC proceedings and receive reparation for the harms suffered.

The Paris Principles could also be useful to define other concepts of ICC provisions, within the scope of child recruitment. For example, Principles 3.2 and 3.3, read within the ICC context, and particularly in application of the principle of non-discrimination contained in Article 21(3) of the Rome Statute, provides for the involvement of girls in the justice process. Thus, this Principle could be of guidance in order respond to the needs of girls and their children, for example by adopting reparations that do not further stigmatise their involvement with an armed group or force and certainly preventing that their situation is worsened because of their participation in ICC proceedings.[93] Likewise, Principle 3.4 translates the principle of "best interests of the child" to the particular situation of former child soldiers, stating that any effort towards the prevention, release, protection and reintegration of child soldiers should include affected children. Additionally, Principle 3.14 is of significance to interpret Article 12 of the CRC as regards former child soldiers, as it establishes that children's views, but also those of their families and communities where the children will return, should always be taken into consideration.

The Paris Principles also include certain guidelines regarding persons working with former child soldiers, and thus could be helpful for ICC judges, prosecutors, lawyers and staff in their work with child victims, particularly victims of child recruitment. In this regard the Paris Principles contain

93 The Paris Principles also refer to the specific situation of girls, affirming that his group suffers from child recruitment and involvement in armed conflict differently from boys, and therefore should be addressed accordingly. Principle 4.1 states that girls are at risk to become "invisible" and encourages measures to ensure that they are included in reintegration, monitoring and follow-up programmes.

operational principles, which when implemented by the ICC, could provide helpful guidelines for its current and future work. For example, Principle 3.17 recommends adoption of a code of conduct for staff that includes protection of children (*i.e.* Guiding Principles of Unaccompanied and Separate Children of the International Red Cross Committee of 2004). In this sense, the ICC could adopt such a Code of Conduct for staff that includes these obligations towards children, particularly victims and witnesses or General Guidelines on Children and the ICC (as proposed in the final chapter of this research). Moreover, Principles 3.18 and 3.19 could be of guidance when the ICC Prosecutor adopts policies for the investigation and prosecution of crimes of child recruitment. For example, the said principles refer to strategies and programmes (*i.e.* investigations, prosecutions, protection programmes, reparation orders), which should be based on a comprehensive analysis of the political, social, economic and cultural context, informed by a gender analysis of the reasons, motivations and incentives of child recruitment and should encompass a thorough risk analysis to ensure that children, families and communities involved with ICC proceedings (*i.e.* as victims or witnesses) are not placed at greater risk for their participation. These principles could thus guide the ICC Prosecutor in her decision to initiate an investigation for crimes of child recruitment.

The Paris Principles also include guidelines regarding coordination, collaboration and cooperation in order to protect and reintegrate former child soldiers. Although this is not in essence the mandate of the ICC, it could be of guidance for ICC reparations and ICC's work in the field with other intergovernmental and non-governmental organisations in the field. It is essential for the ICC to work along with other key actors at international, regional and local levels. For example, Principle 3.26 establishes that coordination, communication, cooperation and information sharing and transparency are essential at all times. In this regard, the Paris Principles recommend creating interagency groups where *inter alia*: roles and responsibilities are agreed, communicated and respected, possible collaborative action is planned, policy and programme approaches are defined, and protocols for information sharing are developed. Accordingly, the ICC could develop such agreements with international, regional, national and local governmental organisations and NGOs in order to complement its investigations, prosecutions and reparation programmes with other efforts being done by other entities at the international level or in the field.

Principle 6 of the Paris Principles mentions the international standards referring to prevention of child recruitment, which particularly refers to the Rome Statute. Principle 6.6 refers to the verification of a child's age, which could be useful as guidance for judges in determining the *mens rea* of an individual in the commission of the crime of enlistment, conscription or use of children under Article 8 of the Rome Statute. In this regard it is provided that "where documentary evidence of the recruit's age is not available, other

means of verification – such as cross checking with other persons and medical screening – may be required".

The Paris Principles also provide valuable guidance on the treatment that should be given to former child soldiers. These could be applicable to victims and witnesses of child recruitment interacting with the ICC. For example, Principle 7.28 provides useful guidelines in relation to interviews of former child soldiers, which could be applicable to the interaction of the ICC with these children (*i.e.* investigators, trial lawyers, judges, etc.).[94] Moreover, Principle 7.75 refers to the psychosocial support to be provided to these children, which could be useful for ICC staff working with children (such as investigators, VWU's staff and judges).[95]

Another important aspect covered by the Paris Principles is that of "inclusive approach to reintegration", which could be taken into consideration, particularly in the implementation of reparation orders and reparation programmes. In this regard, Principle 7.30 states that programmes should support not only children who have been recruited or used, but also include other vulnerable children and thus benefit the wider community. Principles 7.31 and 7.32 could also be applicable when deciding on reparation measures for former child soldiers under Article 75 of the Rome Statute as they address the importance of rehabilitation programmes and material assistance that could

94 For example, the Paris Principles provide that interviews should be carried out by personnel who are trained in interviewing children; children should be interviewed by adults of the same sex wherever possible; multiple interviews should be avoided; sensitive issues should be raised with children only when essential and in their best interests; additional support should be provided as necessary to children during and after the interview; psychological support should be available to children before, during and after interviews; interviews should be conducted in private where they cannot be overheard and confidentiality should be respected at all times by the organisation collecting the information.

95 For example, it is provided that children should be allowed to work together to solve problems, develop social competencies appropriate to civilian life and define their roles and responsibilities in their community; that culturally appropriate approaches to assisting children with emotional and behavioural problems should be identified and assessed. It is also stated that it should not be assumed that all children associated with an armed force or armed group are traumatised although support should be available for children who have been severely affected. Importantly, the Paris Principles provide that the different experiences of girls and boys of different ages and level of responsibilities within the armed force or group should be taken into account.

be provided to former child soldiers.[96] These could be possible reparations schemes under the Rome Statute.

Principle 8 of the Paris Principles is of fundamental importance for ICC proceedings, as it refers to justice mechanisms. This Principle provides that: a) children's participation in international justice must be voluntary; b) under no circumstances should the provision of services or support be dependent on a child's full participation in justice mechanisms; c) information should be gathered from children only in a manner that respects their rights and protects against causing additional distress to the child and should be regarded as confidential; and d) specific information gathered from children should in general only be disclosed upon a court order and in responding to such an order all efforts should be made to secure a further court order ensuring that the information will be treated in a way that respects children's rights and does not cause distress to the child.[97]

As noted above, standards incorporated in the Paris Principles, as well as the child-centred and rights-based approach of this instrument, provide judges, prosecutors, lawyers and the ICC's staff with valuable lessons that could be incorporate in ICC proceedings insofar as they are compatible with the Rome Statute and particularly respectful of the rights of the accused.

96 Principles 7.31 and 7.32 state that rehabilitation programmes should: facilitate local and national reconciliation and should always be preceded by a risk assessment including a cultural and gender analysis addressing issues of discrimination and should be based on the child's best interests irrespective of national considerations or priorities; build on the resilience of children, enhance self-worth and promote their capacity to protect their own integrity and construct a positive life; incorporate the views of women and girls; take into account the age and stage of development of each child and any specific needs; develop links with all programmes, policies and initiatives which may benefit these children and their families either directly, for example through local or national social welfare programmes, or indirectly, through reconstruction and rehabilitation of national institutions and other development programmes. As for material assistance, the Paris Principles provide that this should: aim to enable children leaving an armed force or armed group to assume a place within their community and standard of living comparable to that of other children of the same age; take into account that circumstances vary, and it should not be assumed that all children who have been associated with an armed force or armed group require direct material assistance in order to reintegrate; give particular attention to the needs of children with disabilities or girl mothers; avoid that assistance impedes reintegration, particularly if it is perceived to be rewarding children who have committed acts harmful to their community; be structured and provided in a manner that does not either stigmatise or inappropriately privilege children or place them at risk.

97 Paris Principles, principle 8.

3.4.3 United Nations Resolutions[98]

UN resolutions are not included as "applicable law" under Article 21 of the Rome Statute, however they could be of guidance for the interpretation and application of law in the ICC. In fact, as previously stated, the Appeals Chamber of the ICC confirmed that a UNGA Resolution, particularly the UN Basic Principles, could be applied in this broader sense of "guidance".[99] Although the applicability of UNSC or Economic and Social Council (ECOSOC) Resolutions have not been analysed by the Appeals Chamber yet, they could also be applicable under the same general interpretation of "guidance" explained above.[100]

Moreover, UNGA Resolutions could be of importance in ICC proceedings as they reflect the unanimous view of UN member States and thus could be viewed in some instances as international customary law. For example the UNGA Resolution of 1999 calls upon States and other parties concerned (*i.e.* international organisations such as the ICC) to continue to "cooperate with the Special Representative, to implement the commitments they have undertaken and to carefully consider all the recommendations of the Special Representative and address the issues identified".[101] Likewise, the Resolution of 2006 urges international cooperation to ensure the respect for children's rights in armed conflict and calls upon governments, UN bodies and other actors, to cooperate in concert to fulfil their mandates as regards children.[102]

These UNGA Resolutions recognise the legal capacity and mandate of the ICC to end impunity for serious crimes against children, and urges States (including non State Parties to the Rome Statute) not to grant amnesties for

98 The Resolutions contained in this section were selected from the list of "Key documents" included in the webpage of the Office of the UN Special Representative to the Secretary General on Children and Armed Conflict: <http://www.un.org/children/conflict/english/index.html> accessed 8 August 2013. However, there may be other resolutions, as well as numerous UN reports from other UN Committees, Councils and agencies, which may also be useful in particular ICC cases. Likewise, other UNGA and UNSC resolutions, such as those related to women, peace and security could also be applicable as regards child victims before the ICC.

99 *Lubanga case* 'Judgment on the appeals of The Prosecutor and The Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008' (11 July 2008) ICC-01/04 01/06-1432, para. 33.

100 Though this section does not intend to encompass all resolutions that could apply to the work of the ICC, it will refer to those that have been identified as valuable in what refers to children and their interaction with the ICC. Moreover, ECOSOC Resolution "Guidelines on Justice in Matters involving Child Victims and Witnesses of Crimes" will be analysed and referred to in depth in Chapters 5 and 6 of this research.

101 UNGA, *The Rights of the Child: Resolution adopted by the General Assembly* (17 December 1999) A/Res/54/149 paras 4, 16 and 17.

102 UNGA, *Rights of the Child: Resolution adopted by the General Assembly* (11 January 2006) A/RES/60/231, 9.

these crimes.[103] Moreover, as previously stated, the ICC does not and should not work alone in fulfilling its mandate, and the experience and knowledge acquired by the office of the Special Representative is useful for the work of the ICC. This in fact has been the case in the first trial of the ICC, where judges requested observations to the Special Representative on a series of issues related to the use of children as child soldiers.[104] Thus UNGA Resolutions could reinforce ICC decisions calling for State cooperation in matters related to children in ICC proceedings (*i.e.* investigation of crimes committed against children) as they reflect the commitment of UN member States to work collectively (including with the ICC) in situations where children are affected by armed conflict.[105]

The UNGA Resolution on the "Rights of the Child" of 2003, which incorporates for the first time reference to the Rome Statute of the ICC,[106] and all subsequent UNGA Resolutions that call for the end of impunity for perpetrators of crimes against children as defined in the Rome Statute,[107] could thus be

103 UNGA, *Rights of the Child: Resolution adopted by the General Assembly* (11 January 2006) A/RES/60/231, 5. See also: UNGA, *Rights of the Child: Resolution adopted by the General Assembly* (23 January 2007) A/RES/61/146, 6

104 *Lubanga Case* 'Submission of the Observations of the Special Representative of the Secretary General of the United Nations for Children and Armed Conflict pursuant to Rule 103 of the Rules of Procedure and Evidence' (18 March 2008) ICC-01/04-01/06-1229. The submissions of the Special Representative are further analysed in Chapters 4 and 5.

105 The Resolution of 1999 also referred to the ECOSOC decision to call for "systematic, concerted and comprehensive inter-agency efforts on behalf of children, as well as adequate and sustainable resource allocation to provide both immediate emergency assistance to and long-term measures for children". See: UNGA The Rights of the Child: Resolution adopted by the General Assembly (17 December 1999) A/Res/54/149, para. 11, referring to ECOSOC Conclusions, A/54/3, chap. VI, para. 5, agreed conclusions 1999/1, para. 22. For the final text, see UNGA Official Records, *Report of the Economic and Social Council for 1999: Foreword by the President of the Council* (31 December 1999) A/54/3/Rev.1. For example, the ICC's outreach programme in the Central African Republic implemented such collective work with local and international NGOs and other actors because it lacked permanent staff in that country during the beginning of the investigations. Hence, outreach focused on raising awareness on the mandate of the ICC among representatives of the affected communities (including NGOs, academia, journalists, victims associations, women's groups, students, legal professionals, etc.) is paramount. See: ICC, PIDS, *Outreach Report 2008*. Available at: <http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/outreach/outreach%20reports/Pages/icc%20outreach%20report%202008.aspx> accessed 8 August 2013.

106 UNGA, *Rights of the Child: Resolution adopted by the General Assembly* (19 February 2003) A/RES/57/190, 13.

107 See: UNGA, *Rights of the Child: Resolution adopted by the General Assembly* (9 March 2004) A/RES/58/157; *Rights of the Child: Resolution adopted by the General Assembly* (24 February 2005) A/RES/59/261; *Rights of the Child: Resolution adopted by the General Assembly* (11 January 2006) A/RES/60/231; *Rights of the Child: Resolution adopted by the General Assembly* (23 January 2007) A/RES/61/146; *Rights of the Child: Resolution adopted by the General Assembly* (22 February 2008) A/Res/62/141.

useful legal basis to requests of cooperation, particularly as regards non-State parties to the Rome Statute.

Other UNGA Resolutions, which are more specific in their contents, such as that one of the "Rights of the Child" of 2004, which refers to diversity within the concept of children, particularly addressing the needs of the girl child, children with disabilities, refugee and internally displaced children, child workers and migrant children, could be useful for "guidance" purposes, particularly when interpreting general ICC provisions such as Rule 86 of the RPE.[108] Likewise, the UNGA Resolution on the rights of the child adopted in 2010, which focuses mainly on the rights of children to be heard on matters affecting them, could serve as guidance in the interpretation of ICC provisions in accordance with Article 12 of the CRC.[109]

As explained above, although UNGA Resolutions are not applicable law *per se*, the recommendations contained therein may be implemented, not only within the UN system, but most importantly, by States and other international actors working with children (including the ICC). Most importantly, these UNGA Resolutions reflect some issues in which there is international agreement and consensus on the obligations of States and other international and national actors, and thus *opinio juris*, in relation to children's rights but also as regards States' obligation to cooperate with the ICC. Although it could be argued that most UNGA Resolutions may be very general in their contents to serve as guidance for the application or implementation of the Rome Statute, they could be particularly useful for ICC judges in decisions concerning cooperation of UN member States with the ICC, particularly in relation to non-State Parties to the Rome Statute (*i.e.* in cases triggered by UNSC referrals), in which the legality of the ICC and its jurisdiction to investigate and prosecute certain crimes may be challenged. Accordingly, read together with Chapter IX of the

108 Resolutions on the "girl child" adopted in 2010 and 2011, affirm the need for mainstreaming gender perspective in all policies and programmes regarding children and the need to fight impunity for crimes committed against girls, particularly sexual violence. See: UNGA, *Rights of the Child: Resolution adopted by the General Assembly* (22 February 2008) A/Res/62/141, 2; UNGA, *Rights of the Child: Resolution adopted by the General Assembly* (13 March 2009) A/Res/63/241, 3; UNGA, *The Girl Child: Resolution adopted by the General Assembly* (3 March 2010) A/RES/64/145, para. 29; UNGA, *The Girl Child: Resolution* (18 November 2011) A/C.3/66/L.24/Rev.1; UNGA, *Rights of the Child: Resolution adopted by the General Assembly* (9 March 2004) A/RES/58/157, 8-9.

109 This resolution emphasises that children's participation must be institutionalised and active consultation of children and the consideration of their views must be encouraged. The Resolution also concludes that institutions dealing with children (such as the ICC) should adopt a child-centred attitude, establish or strengthen structures for children, involve children in planning, design and evaluation of policies and plans, fund for the participation of children, ensure equal participation of children, including girls and adolescents, and ensure child-sensitive procedures. See: UNGA, *Rights of the Child: Resolution adopted by the General Assembly* (3 March 2010) A/Res/64/146, paras 32, 33 and 58.

Rome Statute and the principle of complementarity, UNGA Resolutions confirm the obligation of all UN member States to cooperate with the ICC.

As regards UNSC Resolutions, their validity as applicable law in the ICC has not yet been analysed by the judges of the ICC. However, they could be of significance, since in light of Article 13 of the Rome Statute, a referral by the UNSC by way of Resolution from that body is one of the three triggering mechanisms of the ICC's jurisdiction. This gives noticeably some validity to the UNSC Resolutions as applicable law within the ICC. Moreover, UNSC Resolutions could be of use to determine whether crimes within the jurisdiction of the ICC have been committed, particularly the newly defined crime of aggression.

In relation to children and armed conflict, UNSC Resolutions have been taken on a nearly yearly basis since 1999.[110] Although their contents, as with UNGA Resolutions, may sometimes be too general, these Resolutions could be of relevance for ICC proceedings, particularly as regards cooperation of non-State Parties with the ICC when crimes against children are committed. For example, Resolution 1314 (2000) urges all parties to armed conflict to bear in mind relevant provisions of the Rome Statute, while it urges Member States of the UN to sign and ratify the Optional Protocol to the CRC. This is the first UNSC Resolution that refers to the Rome Statute. Although in this Resolution the UNSC gives a different legal value to the Rome Statute vis-à-vis the Optional Protocol to the CRC (it does not "urge" for its ratification),[111] the fact that the UNSC (and therefore some of its permanent members who oppose or have not ratified the Rome Statute) mentions the Rome Statute and urges its consideration in situations of armed conflict, was already a significant victory for the ICC's positioning in the international arena (as this Resolution was issued even before the Rome Statute entered into force). Subsequent UNSC Resolutions that have referred situations to the ICC (*i.e.* Darfur and Libya), have

110 UNSC, *Security Council resolution 1261 (1999) (on children in armed conflicts)* (25 August 1999) S/RES/1261 (1999); *Security Council resolution 1314 (2000) (on the protection of children in situations of armed conflicts)* (11 August 2000) S/RES/1314 (2000); *Security Council resolution 1379 (2001) (on the protection of children in armed conflicts)* (20 November 2001) S/RES/1379 (2001); *Security Council resolution 1460 (2003) (on children in armed conflict)* (30 January 2003) S/RES/1460 (2003); *Security Council resolution 1539 (2004) (on children in armed conflict)* (22 April 2004) S/RES/1539 (2004); *Security Council resolution 1612 (2005) (on children in armed conflict)* (26 July 2005) S/RES/1612 (2005); *Security Council resolution 1882 (2009) (on children and armed conflict)* (4 August 2009) S/RES/1882 (2009) and *Security Council resolution 1998 (2011) (on children and armed conflict)* (12 July 2011) S/RES/1998 (2011). See also: Matthew Happold, *Child Soldiers in International Law* (Manchester 2005) p. 42-49.

111 UNSC, *Security Council resolution 1314 (2000) (on the protection of children in situations of armed conflicts)* (11 August 2000) S/RES/1314 (2000), paras 3 and 4.

reinforced the position of the ICC vis-à-vis the international community and particularly as regards non-State parties.[112]

Most importantly, as these UN Resolutions reflect reiterated and often unanimous declarations to the ICC's jurisdiction as regards international crimes in general, but also in particular as regards crimes committed against children, they serve as clear examples of the international community's acknowledgment that the ICC has jurisdiction to investigate and prosecute crimes committed against children, including in situations where these crimes occur in the territory of non-State parties (*i.e.* Libya and Darfur). Moreover, these Resolutions reflect the international community's commitment to cooperate with the ICC in fulfilling its mandate.

3.5 Regional Instruments and Case Law

3.5.1 Brief introduction to the Regional Human Rights Systems

The case law of the regional human rights systems could be useful for ICC proceedings, as they offer guidance to ICC judges when interpreting patent human rights provisions (such as Article 67 of the Rome Statute).[113] The ECtHR has valuable jurisprudence that could thus be helpful for the ICC judges when interpreting concepts such as fair trial and equality of arms, for example vis-à-vis protective measures for child victims or witnesses.[114] Moreover, in particular the case law of the IACtHR could be of use for the ICC when taking decisions pertaining to reparations, as this regional court has developed extensive jurisprudence on this subject.[115] As regards the African Court on

112 Likewise, Resolution 1379 (2001), though not referring specifically to the Rome Statute, does call Member States to put an end to impunity, and prosecute those responsible for international crimes. committed against children and to ensure that post-conflict and truth-and-reconciliation processes address serious abuses involving children. See: UNSC, *Security Council resolution 1379 (2001) (on the protection of children in armed conflicts)* (20 November 2001) S/RES/1379 (2001), para. 9(a).

113 *Lubanga case* 'Judgment on the appeal of Mr Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled "First Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81"' (14 December 2006) ICC-01/04-01/06-773, paras 50 and 51. The Appeals Chamber referred to the ECtHR: *Doorson v the Netherlands* (26 March 1996) Reports of Judgments and Decisions 1996-II, para. 72.

114 The ECtHR has its origins in the Council of Europe's European Convention on Human Rights (European Convention) of 1950. The 47 State Parties to the Council of Europe are automatically parties to the Convention and are under the jurisdiction of the ECtHR. The ECtHR has its headquarters in Strasbourg, France and after the adoption of Protocol 11 in 1998, the ECtHR was reformed into a permanent tribunal. Information has been obtained via the website of the ECtHR: <http://www.echr.coe.int> accessed 8 August 2013.

115 The IACtHR was created through the Inter-American Convention on Human Rights of the Organisation of American States. Although the international treaty was signed in 1969, it was not until 1978 that it was enforced. The IACtHR was not established until 1979 in

Human and Peoples' Rights (AFCtHPR), its case law (when it develops) could be of use for future ICC decisions.[116]

As these three courts have jurisdiction to make advisory opinions and to render judgments regarding contentious cases of violations of human rights in these three continents, they have in general the potential to also overlap with the ICC's jurisdiction as violations of human rights to be evaluated by these regional courts could also encompass crimes within the Rome Statute. Hence, the ICC could also refer to these regional court's findings (i.e. to determine whether there was an "attack" under crimes against humanity). Moreover, regarding victims' participation, individuals acting in the ECtHR could also be victims in ICC cases related to crimes committed in a State party to the ICC but also to the ECtHR system.[117] Moreover, in relation to the IACtHR, victims could be entitled to reparations in the regional human rights system but also in ICC proceedings. Thus, in the future it could be possible that the ICC would in a sense "share" its jurisdiction with these regional human rights courts.

3.5.2 The African Human Rights System

To date the AFCtHPR has only rendered one judgment on merits.[118] However this judgment relates more to the jurisdiction of the court, which still needs to be reinforced, than to specific violations of human rights, and particularly children's rights. The court has made various decisions declaring it has no

San José, Costa Rica. However, unlike its European counterpart, the IACtHR is not permanent. The judges meet only periodically in sessions in order to hear and decide upon pending cases. The information has been obtained via the website of the Inter-American Court of Human Rights: <http://www.corteidh.or.cr/> accessed 8 August 2013.

116 The AFCtHPR was established by the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, adopted by the then Organisation of African Unity (OAU) in Ouagadougou, Burkina Faso in 1998. The Protocol entered into force in January 2004 and in 2006, the AFCtHPR was created and its judges were elected. The AFCtHPR has its seat in Arusha, Tanzania, and like its Inter-American counterpart, is not permanent. The AFCtHPR has 25 State Parties, namely those members of the OAU that have additionally ratified the Protocol relevant to the establishment of the AFCtHPR. Unlike the IACtHR and ECtHR, which have decades of functioning, the AFCtHPR only became functional in 2008, when it received its first cases. Information has been obtained via the website of the African Court on Human and Peoples' Rights: <http://www.african-court.org> accessed 8 August 2013.

117 The IACtHR still requires that cases be presented via the Inter-American Commission of Human Rights, which declares the cases admissible in first instance and then presents the claim to the tribunal. In the AFCtHPR, NGOs with Observer Status before the African Commission and individuals can institute cases directly before that tribunal if the State party from which they come from has made a declaration allowing such direct applications. In all three systems States can directly present cases.

118 *Femi Falana v African Union* 'Judgment of 26 June 2012' (26 June 2012) Application No 001/2011.

jurisdiction, particularly because NGOs or individuals have applied without the State declaration allowing for such direct application. Nevertheless, this regional tribunal has several pending cases and consequently it is expected that the AFCtHPR will render more judgments in the near future.[119] As noted above, this regional human rights system may be of value in the future, once it consolidates jurisprudence that could be useful for the ICC.

As regards children's rights, it is important to note that the African human rights system adopted in 1990 the African Charter on Rights and Welfare of the Child, which entered into force in 1999. This is an innovative instrument that has been ratified by 41 African states, and deals with children's rights from a unique African perspective.[120] As stated by the UN, the CRC and its Optional Protocol, along with the African Charter, constitute the legal backbone of war-affected children in Africa and their co-existence provides windows of opportunity for the effective protection of children living in conflict and post-conflict situations across the continent.[121]

The African Charter refers to forms of children's rights violations that are closely related to crimes under the jurisdiction of the ICC. For example, Article 22 refers to children and armed conflict and adopts the same threshold as the Optional Protocol to the CRC, which is a prohibition of child recruitment under the age of 18. Article 23 touches upon refugee and internally displaced children, guaranteeing the same rights to both categories. Furthermore, Article 25 of the Charter refers to children separated from their parents, and establishes the obligation to give special protection and assistance to these children, and thus brings together the principle of best interests of the child with other children's rights (the right to family life and the right to the child's ethnic, religious or linguistic background) regarding protection and assistance of these children in situations of armed conflict. Other provisions of the Charter could be of use to interpret crimes within the ICC's jurisdiction committed against children. For example, Article 27 of the Charter refers to crimes of sexual exploitation against children, prohibiting not only sexual exploitation, but also any type of inducement, coercion or encouragement of a child to engage in any sexual activity. Although under Article 22 of the Rome Statute, crimes within the ICC's jurisdiction should be interpreted in accordance with the principle of legality, the definition adopted by the Charter could be of use

119 See: <http://www.african-court.org/en/index.php/2012-03-04-06-06-00/list-cases> accessed 8 August 2013.

120 See: <http://www.achpr.org/instruments/child/ratification/> accessed 8 August 2013.

121 Centre for Conflict Resolution and Office of the United Nations High Commissioner on Human Rights, *Children and Armed Conflicts in Africa*: *Policy Advisory Group Seminar Report* (April 2007) 6.

to interpret the crimes of "other forms of sexual violence", when these are committed against children.[122]

It is also important to note that the Charter created an African Committee of Experts on the Rights and Welfare of Child, which is the main treaty-created body that has as mandate children's rights protection and promotion in the African continent (Articles 32-46). This Committee could eventually cooperate with the ICC in the investigation and prosecution of crimes committed against children. For example, the Committee could submit an expert report on children in situations investigated or prosecuted by the ICC in the African continent or could also cooperate in the enforcement of reparations orders where child victims in Africa are beneficiaries. This would not only be particularly helpful for the ICC's work, it could also provide the ICC with a unique African insight of the situation of children in this continent and the particular effects of crimes under the jurisdiction of the ICC upon children in the African context.

3.5.3 Inter-American Human Rights System

In relation to children's rights, the Inter-American system has no specific instrument related to this group. However, the case law of the IACtHR in this area is valuable and could be of guidance for the current and future work of the ICC. Using as starting point Article 19 of the American Convention on Human Rights and Article 16 of the Additional Protocol to the American Convention on Human Rights, that briefly and very generally refers to the rights of the child,[123] the IACtHR has interpreted many other human rights

122 Another Article that could be particularly important, as it is closely related to such crimes as child recruitment and sexual slavery in present armed conflicts, is Article 28 of the Charter, which refers to the protection of children against the use of drugs, their production and their trafficking. Article 29 of the Charter, which touches upon sale, trafficking and abduction of children by any person, including their parents or legal guardians, is also a valuable provision that could be used to encompass within crimes such as child recruitment, other forms of abduction or abuse against children (*i.e.* begging).

123 Article 19 of the American Convention on Human Rights provides the following: Every minor child has the right to the measures of protection required by his condition as a minor on the part of his family, society, and the state. Article 16 of the Additional Protocol to the American Convention on Human Rights states: Every child, whatever his parentage, has the right to the protection that his status as a minor requires from his family, society and the State. Every child has the right to grow under the protection and responsibility of his parents; save in exceptional, judicially-recognized circumstances, a child of young age ought not to be separated from his mother. Every child has the right to free and compulsory education, at least in the elementary phase, and to continue his training at higher levels of the educational system. See: Organisation of American States, *American Convention on Human Rights ("Pact of San Jose", Costa Rica)* (22 November 1969); Organisation of American States, *Additional Protocol to the American Convention on Human Rights in the*

provisions within the Inter-American system from the perspective of children, providing an hermeneutic analysis of all other rights included in these instruments with the rights of the child. Accordingly, the IACtHR has stated that the content and scope of Article 19 of the American Convention must be specified, taking into account the pertinent provisions of the Convention of the Rights of the Child, as this instrument and the American Convention "are part of a very comprehensive international *corpus juris* for protection of children".[124]

Although, contrary to the ICC, jurisdiction of the IACtHR is based on state-responsibility, the IACtHR has established standards that could be applicable in the ICC's system, such as protection of children in situations of armed conflict, the crime of child recruitment, but also as regards reparations for child victims of gross violations of human rights. As Feria-Tinta has noted, the IACtHR has pronounced itself on individual rights of children under complaint procedures in a way that no other international judicial body has been empowered to do.[125] In more than three decades of existence, the IACtHR has rendered decisions regarding children in situations of extreme vulnerability, such as situations of armed conflict, forced disappearances, torture, street children, etc. Undoubtedly these ground-breaking rulings will be of value for the work of the ICC as many of these gross violations of human rights are also crimes within the jurisdiction of the ICC.

Far from endeavouring to analyse in depth the wide-ranging case law of the IACtHR, this Chapter will briefly refer to some of the most important rulings of this regional Court that could be of significance to guarantee children's rights within the ICC's system. Although the ICC is a criminal tribunal, it also has particular characteristics, which are parallel to the IACtHR proceedings, particularly as regards victims' participation and their right to receive reparations. Moreover, given that most ICC crimes are also violations to human rights, the IACtHR case law may be of use when defining crimes within ICC's jurisdiction (such as child recruitment).[126]

The first case brought before the IACtHR concerning children was the *Villagrán Morales Case against Guatemala*, better known as the "*Street Children*

Area of Economic, Social and Cultural Rights ("Protocol of San Salvador") (16 November 1999) A52.

124 *Mapiripán Case*, Merits Reparations and Costs, Judgment of September 15, 2005 Series C No 134, para. 153.

125 Mónica Feria Tinta, *The Landmark Rulings of the Inter-American Court of Human Rights on the Rights of the Child* (Leiden, Martinus Nijhoff Publishers 2008) 2.

126 This section is based on the reading of these main decisions as well as the analysis made by Mónica Feria Tinta on the case law of the IACtHR regarding children's rights. However, since the IACtHR has developed more case law related to the rights of children in the latter years, this Chapter also includes more recent jurisprudence. See: Mónica Feria Tinta, *The Landmark Rulings of the Inter-American Court of Human Rights on the Rights of the Child* (Leiden, Martinus Nijhoff Publishers 2008).

Case".[127] In this case dealing with the crimes committed against street children in Guatemala, the IACtHR dealt with crimes of torture and wilful killing (both crimes currently under the jurisdiction of the ICC). In more recent cases the IACtHR has also referred to child soldiers and children in armed conflict, all which could be applicable to situations and cases brought before the ICC.

3.5.3.1 Definition of child

In reference to the definition of a child, the IACtHR adopted the standard of the CRC since its first case, stating that a child is anyone under the age of 18, unless by law, he/she previously attained majority.[128] The IACtHR has also referred to the superior interests of the child, affirming that the prevalence of the child's superior interests should be understood as the need to satisfy all the rights of the child. In the view of the IACtHR, the superior interests affect the interpretation of all the other rights established in the Convention when a case refers to children.[129] According to Feria-Tinta, this example very well serves to illustrate how rights could intertwine and indeed be indivisible.[130] This interpretation of the IACtHR could be of use, for example, when determining the "superior" or best interests of the child requiring protective or special measures, vis-à-vis the rights of the accused in ICC proceedings.

3.5.3.2 Special protection of children, particularly during armed conflict and in situations of gross violations of human rights

The IACtHR also determined that due to the vulnerability of children vis-à-vis adults' human rights violations against children are crimes against humanity and they are an aggravating factor of responsibility (State-responsibility).[131] The IACtHR has affirmed that violations such as inhumane treatment, torture, etc. are worse when children are victims of these violations, since the State has a special obligation regarding them, over and above those it has regarding adults.[132] The IACtHR has also concluded that the special vulnerability of boys

127 Case of the "Street Children" (Villagrán-Morales et al) v Guatemala (*Street Children case)* Reparations and Costs, Judgment of May 26, 2001 Series C No 77.

128 *Street Children case*, Merits, Judgment of November 19, 1999 Series C No 63, para. 188.

129 Case of the Girls Yean and Bosico v Dominican Republic (*Yean and Bosico case)* Preliminary Objections Merits Reparations and Costs, Judgment of September 8, 2005 Series C No 130, para. 134.

130 Mónica Feria Tinta, *The Landmark Rulings of the Inter-American Court of Human Rights on the Rights of the Child* (Leiden, Martinus Nijhoff Publishers 2008) 218.

131 *Street Children case,* Merits, Judgment of November 19, 1999 Series C No 63, para. 146 and Case of Bulacio v Argentina (*Bulacio case)* Merits Reparations and Costs, Judgment of September 18, 2003 Series C No 100, para. 133.

132 Case of the "Juvenile Reeducation Institute" v Paraguay (*JR Institute case*) Preliminary Objections Merits Reparations and Costs, Judgment of September 2, 2004 Series C No 112, paras 301-302.

and girls due to their condition as such becomes even more evident in a situation of armed conflict, since they are least prepared to adapt or respond to said situation and, sadly, it is they who suffer its abuse in a disproportionate manner.[133] This interpretation of the IACtHR could be helpful when determining whether the threshold of ICC's jurisdiction has been reached (*i.e.* when deciding whether serious bodily or mental harm has been committed as a crime of genocide). In light of the aforesaid case law, the ICC judges could interpret that the "seriousness" requirement is reached more easily when the crimes are committed against children than against adults.

In regards to children's rights in situations of armed conflict, the IACtHR's judgment in the *Gomez Paquiyauri v. Peru Case* was the first international case concerning protection of children in the context of an armed conflict to be adjudicated by an international tribunal where the substantive law concerning the rights of the child was fully examined.[134] In this case, the IACtHR established that special measures of protection and additional duties that States have towards the fundamental rights of children are non-derogable in times of war.[135] Findings such as this one of the IACtHR could be of use when determining whether war crimes were committed against children as protected civilians under international humanitarian law, and particularly when interpreting common Article 3 of the Geneva Conventions.

Referring to crimes of torture committed against children, the IACtHR has also established important jurisprudence as regards the crime of torture, which could be of use to define this crime in ICC proceedings. The IACtHR has stated that in order to determine whether torture has been committed, all circumstances should be taken into consideration, including nature, context and method of aggressions, their physical and mental effects and the sex, age and state of health of the victims.[136] Regarding the psychological effects of torture, the IACtHR indicated that this might be inferred (particularly when the victim is no longer alive) as a result of the circumstances in which the crime of torture was committed.[137] These findings could thus be also useful when determining the "harms suffered" in ICC reparations proceedings for child victims of torture.

The IACtHR extensively analysed the crime of forced disappearances, and thus its jurisprudence could be particularly helpful to define this crime

133 *Mapiripán Case*, Merits Reparations and Costs, Judgment of September 15, 2005 Series C No 134, para. 156.

134 Mónica Feria Tinta, *The Landmark Rulings of the Inter-American Court of Human Rights on the Rights of the Child* (Leiden, Martinus Nijhoff Publishers 2008) 58 referring the Case of the Gómez-Paquiyauri Brothers v Peru (*Gómez case*) Merits Reparations and Costs, Judgment of July 8, 2004 Series C No 110.

135 Mónica Feria Tinta, *The Landmark Rulings of the Inter-American Court of Human Rights on the Rights of the Child* (Leiden, Martinus Nijhoff Publishers 2008) 154, referring to the *Gómez case,* Merits Reparations and Costs, Judgment of July 8, 2004 Series C No 110.

136 *Street Children case* Merits, Judgment of November 19, 1999 Series C No 63, para. 74.

137 *Street Children case* Merits, Judgment of November 19, 1999 Series C No 63, para. 163.

included in the Rome Statute but also to determine the harms suffered by victims of forced disappearances. As regards child victims of this crime, the case law of the case of *Contreras et al. v. El Salvador* is of significance, since the IACtHR determined that the abduction of children and separation from their parents and family harms the mental, physical and moral integrity of children and leads to feelings of "loss, abandonment, intense fear, uncertainty, anguish, and pain, all of which could vary or intensify depending on age and the specific circumstances".[138] The IACtHR also determined children's rights to an identity and a name and to have a family are violated when these crimes are committed.[139]

In the case of *Gelman v. Uruguay*, the IACtHR also analysed the situation of a child who was abducted from her biological parents as a baby and given away to another family during the Argentinean and Uruguayan dictatorships in the 1970's.[140] The IACtHR determined that the abduction of children constitutes a complex act that involves a series of illegal actions and violations of rights that impede restoration of the relationship of the children and their family members.[141] In another case, the *Cotton Fields case,* the IACtHR determined that violence against children takes a variety of forms and is influenced by a wide range of factors, from the personal characteristics of the victim and perpetrator to their cultural and physical environments and includes all forms of physical or mental violence, injury and abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse.[142] Findings of the IACtHR in cases of forced disappearances and abductions of children such as the above, could be useful for ICC proceedings dealing with child recruitment, abductions of children for slavery, including sexual slavery, forced prostitution of children, and forced displacement of children, since all these crimes have in common the fact that children are very often deprived of their family life and identity.

The IACtHR has also analysed crimes of sexual violence committed against children, and it has concluded that during armed conflicts women and girls face specific situations affecting their human rights, such as rape, which is often used as a symbolic means of humiliating the opposing side and predominantly affects those who have reached puberty or adolescence. It has also determined that sexual violence "can include acts that do not involve penetra-

138 Case of Contreras et al v El Salvador (*Contreras case)* Merits Reparations and costs, Judgment of August 31, 2011 Series C No 232, para. 85.

139 Case of the "Las Dos Erres" Massacre v Guatemala (*Las Dos Erres case)* Preliminary Objection Merits Reparations and Costs, Judgment of November 24, 2009 Series C No 211.

140 Case of Gelman v Uruguay (*Gelman case)* Merits and Reparations, Judgment of February 24, 2011 Series C No 221.

141 Case of Gelman v Uruguay (*Gelman case)* Merits and Reparations, Judgment of February 24, 2011 Series C No 221, para. 120.

142 Case of González et al v Mexico (*Cotton Field case)* Preliminary Objection Merits Reparations and Costs, Judgment of November 16, 2009 Series C No 205 para. 407; *Contreras case,* Merits Reparations and costs, Judgment of August 31, 2011 Series C No 232, para. 101.

tion or even any physical contact".[143] Such findings could be useful in ICC proceedings to determine whether rape was committed with a genocidal intention (with the intent of humiliating a group) but also to determine "other forms of sexual violence" that go beyond the physical contact (*i.e.* forced pornography).

The IACtHR also has extensive case law regarding the rights of indigenous persons, which could be applicable to ICC proceedings in cases in which the victims are part of an indigenous group. In this regard, the IACtHR has been particularly pioneering in the topic of the harms suffered by indigenous persons and consequently adequeate reparations for those harms. For example, in the case of *Xákmok Kásek Indigenous Community v. Paraguay*, the IACtHR referred to violations suffered by the indigenous community and the particular effects they had in children's education, healthcare and overall wellbeing.[144] In the case of *Chitay Nech et al. v. Guatemala*, the Court referred to the effects of forced disappearances and forced displacement in the lives of children in an indigenous community, which carries abandonment of their traditions and culture.[145]

3.5.3.3 Recruitment of children

The IACtHR has also dealt with crimes of child recruitment as violations of human rights within the Inter-American system. Although recruitment could be a violation of human rights and not necessarily a crime within the ICC's jurisdiction, its jurisprudence could be useful to determine the harms suffered by child victims of these crimes and the consequent reparations.

In the Case of *Vargas Areco v. Paraguay*, the IACtHR dealt with recruitment of children under the age of 18 in the armed forces of that country. Although this case was about torture and killing of a minor who had been recruited by the Paraguayan armed forces, and did not directly deal with the legality of his recruitment, the IACtHR affirmed that international law sets forth special rules to protect the physical and psychological integrity of children while involved in military activities, whether in times of peace or during armed conflict.[146] In this case, the IACtHR referred to the coercive environment in which children are recruited, since many of them are recruited "through

143 *Cotton Field case,* Preliminary Objection Merits Reparations and Costs, Judgment of November 16, 2009 Series C No 205, para. 407.

144 Case of the Xákmok Kásek Indigenous Community v Paraguay (*Xákmok Kásek case)* Merits Reparations and Costs, Judgment of August 24, 2010 Series C No 214.

145 Case of Chitay Nech et al v Guatemala (*Chitay case)* Preliminary Objections Merits Reparations and Costs, Judgment of May 25, 2010 Series C No 212 paras 125 and 135.

146 Case of Vargas-Areco v Paraguay (*Vargas-Areco case)* Merits Reparations and Costs, Judgment of September 26, 2006 Series C No 155, para. 112.

coercion on the children themselves or their relatives".[147] This finding is significant, particularly since the child, who was 15 years old at the time of his recruitment, had presumably enlisted "voluntarily". This interpretation could be of use in determining cases of child recruitment before the ICC and the reasoning of whether voluntary enlistment exists at all in coercive circumstances such as poverty, armed conflict or internal displacement.

3.5.3.4 Procedural rights of children

The IACtHR has also adopted important rulings referring to children's rights in judicial proceedings, interpreting the principle of equality and non-discrimination from a children's rights perspective. Thus, findings such as the one below, could be useful for ICC proceedings involving child victims or witnesses: "the notion of equality springs directly from the oneness of the human family and is linked to the essential dignity of the individual. That principle cannot be reconciled with the notion that a given group has the right to the privileged treatment because of its perceived superiority. It is equally irreconcilable with that notion to characterize a group as inferior and treat it with hostility or otherwise subject it to discrimination in the enjoyment of rights which are accorded to others not so classified. It is impermissible to subject human beings to differences in treatment that are inconsistent with their unique and congenerous character".[148]

The IACtHR also stated that the principle of equality does not impede adoption of specific regulations and measures regarding children who require different treatment due to their special conditions insofar as this treatment is targeted towards the protection of children's rights and interest.[149]

Taking into consideration the above conclusions of the IACtHR, Article 21(3) of the Rome Statute could be read using the above interpretation in order to adopt measures (including affirmative action) to have children represented in ICC proceedings (as victims participating pursuant to Article 68(3) of the Rome Statute and as beneficiaries of reparations pursuant to Article 75 of the Rome Statute). The IACtHR has concluded that children participate in judicial proceedings under different conditions from those of an adult and thus, special measures should be adopted for an effective defence of their interests and in order to ensure that children enjoy a true opportunity for justice. Although the IACtHR has made these findings mainly in relation to children in conflict with the law, these general principles are still applicable within the context of children participating as victims and witnesses in ICC proceedings. In this

147 *Vargas-Areco case,* Merits Reparations and Costs, Judgment of September 26, 2006 Series C No 155, para. 129.

148 Juridical Condition and Human Rights of the Child (*Child Advisory Opinion)* Advisory Opinion OC-17/02 of August 28, 2002 Series A No 17, para. 45.

149 Child Advisory Opinion, para. 79.

sense, the IACtHR findings could be of use to affirm in ICC proceedings that children have at least the same fundamental guarantees of due process as any other person, but that additional safeguards are also necessary to fulfil the ICC's mandate pursuant to Rule 86 of the RPE.[150]

The IACtHR's Advisory Opinion on the Juridical Condition and Human Rights of the Child could be of great significance for ICC proceedings, particularly when defining the principle of non-discrimination enshrined in Article 21(3) in cases where children are involved in ICC proceedings. In this decision, the IACtHR determined that it is evident that a child participates in proceedings under different conditions from those of an adult and to argue otherwise would disregard reality and omit adoption of special measures for protection of children, to their grave detriment. Therefore, the IACtHR determined that it is indispensable to recognise and respect differences in treatment, which correspond to different situations among those participating in proceedings.[151] The IACtHR also established in that same decision that to accomplish its objectives, the judicial process must recognise and correct any real disadvantages that may require countervailing measures (*i.e.* in the ICC context these could be protective and special measures, but also outreach activities targeting child victims) that help to reduce or eliminate the obstacles and deficiencies that impair or diminish an effective defence of one's interests. The IACtHR further concluded that if these countervailing measures are not adopted, it is impossible to say that there is true opportunity for justice.[152]

> In relation to the actual participation of a child in the proceedings, the IACtHR stated that the degree of participation of a child in the proceedings must be reasonably adjusted, so as to attain effective protection of his or her best interests. It determined that those responsible for the application of the law, must take into account the specific conditions of the child and his or her best interests to decide on his or her participation, as appropriate, in establishing his or her rights, considering as much as possible, the views of the child of his or her own case.[153] These conclusions could be helpful in ICC proceedings when determining whether the participation of a child victim pursuant to Article 68(3) of the Statute is appropriate, not only vis-à-vis the rights of the accused, but also as regards the best interests of the child.

The IACtHR could also offer useful case law as regards protective and special measures under Rules 87 and 88 of the RPE vis-à-vis the rights of the accused under Article 67 of the Rome Statute. For example, as to the public nature of judicial proceedings, the IACtHR has stated that when addressing issues pertaining to children, it is appropriate to set certain limits to the principle of

150 Mónica Feria Tinta, *The Landmark Rulings of the Inter-American Court of Human Rights on the Rights of the Child* (Leiden, Martinus Nijhoff Publishers 2008) 41-42.
151 Child Advisory Opinion, para. 96.
152 Child Advisory Opinion, para. 97.
153 Child Advisory Opinion, paras 101-102.

publicity of proceedings, not in relation to the parties, but rather vis-à-vis the public observation of the procedural acts.[154]

3.5.3.5 Children's rights to reparation

As stated before, perhaps the most valuable case law of the IACtHR is that one pertaining to reparations, as in this aspect the IACtHR has been undoubtedly pioneering and often unique. The IACtHR has significant case law as regards the concept of victim and thus, within the ICC context, its case law could be helpful to define a victim under Rule 85 of the RPE and consequently also to determine whether the victim suffered harm (for the purposes of participation under Article 68(3) of the Rome Statute, but also reparations pursuant to Article 75 of the Rome Statute). Moreover, the IACtHR case law could be helpful in order to determine the evidentiary threshold required under Rule 85 of the RPE, and particularly whether inferences of the harm suffered are possible in this regard.

The IACtHR has adopted a notion of victim and beneficiary that encompasses not only the child, but also his or her family as direct victims of violations, as it has stated that relatives of these children are also direct victims of violations, since crimes suffered by child victims may also constitute cruel and inhumane treatment for their relatives, particularly their parents. The IACtHR has also established that circumstances such as the closeness of the family relationship and the degree to which the family member(s) witnessed the violation, are elements to consider as to whether they are also victims of violation.[155] In fact the IACtHR has established that in cases of gross violations against children (particularly forced disappearances and torture) no evidence is required to conclude that the distress suffered by the child extends to the closest members of the family, especially those who had close emotional contact with the child, such as parents, siblings and grandparents.[156] The IACtHR also stated that relatives of child victims are victims themselves on account of their own suffering as they suffer from psychological distress as a direct consequence of the violation suffered by the child.[157] Likewise, the IACtHR has concluded that when parents of children suffer from gross human rights violations (*i.e.* extrajudicial killings), the Court may infer that the violation could have prejudiced the schooling of the children of the victim, even if there is no evidence in this regard.[158] Importantly, the IACtHR has adopted a broad concept of

154 Child Advisory Opinion, para. 134.
155 *Street Children case,* Merits, Judgment of November 19, 1999 Series C No 63, para. 174.
156 *Bulacio case,* Merits Reparations and Costs, Judgment of September 18, 2003 Series C No 100, paras 98-99.
157 *Vargas Areco case,* Merits Reparations and Costs, Judgment of September 26, 2006 Series C No 155, para. 95.
158 Case of Family Barrios v Venezuela (*Barrios case*) Merits Reparations and Costs, Judgment of November 24, 2011 Series C No 237, para. 336.

family and next-of-kin which could certainly be useful in cases involving child victims before the ICC. The IACtHR has stated that the concept of family goes beyond marriage-based relationships and may encompass other *de facto* family ties where the parties are living together outside marriage.[159]

In relation to child victims who have died, the IACtHR has established that family members, such as the mother and grandmother of child victims are to be considered on the one hand as successors of their next of kin who are dead and, on the other, as victims themselves, since the IACtHR presumes that a person's death causes non-pecuniary damage to his/her parents and siblings.[160] Moreover, the IACtHR established that children who were not yet born at the time of the violation (*i.e.* forced disappearance) also suffered a violation of their moral and mental integrity because they lived in an environment of suffering and uncertainty.[161]

As regards the notion of harm and reparation, the IACtHR has developed important jurisprudence on the concept of "damage to a life plan" of an individual as a result of grave violations to his/her human rights. In cases involving children, the IACtHR has established that measures adopted to protect children are of special importance, because children are at a critical stage in their physical, mental, spiritual, moral, psychological and social development that will impact, in one way or another, their life plan.[162] However, determining the life plan, and thus the material harm suffered by children may be difficult given the lack of precise information on real earnings of victims. In these cases, the IACtHR has determined for example, that the minimum wage in the country where the victims lived was used as basis to grant compensation to the victims and/or their relatives. The IACtHR has established that in what refers to children, where there is no certainty regarding the activity or profession they might practice in the future, the IACtHR has deemed that loss of earnings must be based on evidence that establishes losses with certainty. The IACtHR thus determined that this loss of earnings must be calculated on basis of the victim's age and the end of his or her life expectancy at the time of the events coupled with the minimum wage in force in the country concerned.[163] The IACtHR also established that violations to children can also result in damages to their families, for example, loss of jobs of the parents due to the

159 Child Advisory Opinion, para. 69.

160 *Street Children case* Merits, Judgment of November 19, 1999 Series C No 63, paras 65-68.

161 *Contreras case,* Merits Reparations and costs, Judgment of August 31, 2011 Series C No 232, para. 122.

162 *JR Institute case*, Preliminary Objections Merits Reparations and Costs, Judgment of September 2, 2004 Series C No 112, para. 172.

163 *Street Children case*, Merits, Judgment of November 19, 1999 Series C No 63, paras 79-81; Preliminary Objections Merits Reparations and Costs, Judgment of September 2, 2004 Series C No 112, para. 288; *Mapiripán Case*, Merits Reparations and Costs, Judgment of September 15, 2005 Series C No 134, para. 277.

change in their personal circumstances because of the violations (*i.e.* death or disappearance of a child).[164]

Regarding non-pecuniary damage, the IACtHR has determined that this includes both the suffering and distress caused to the direct victims and their next of kin, and the impairment of values that are highly significant to them and their next of kin as well as other sufferings that cannot be assessed in financial terms. Given their nature, the IACtHR granted reparations for these damages by paying sums of money or goods or services that can be monetarily assessed, applying judicial discretion and the principle of equity. The IACtHR has also granted reparation in form of execution of acts or works of a public nature which recover the memory of the victims, re-establishes their reputation, comforts their next of kin or transmit a message of official condemnation to the violations in question.[165]

Although the jurisdiction of the IACtHR and the ICC are different as regards responsibility (State v. individual responsibility), the findings of the IACtHR are valuable to the ICC in various manners. Firstly, as noted above, the IACtHR case law could be of guidance as regards the definition of general principles included in the Rome Statute (such as the principle of non-discrimination and the right to a fair trial). The IACtHR case law could also be useful when defining a crime under the jurisdiction of the ICC, particularly when this crime has been committed against children (*i.e.* to determine whether "serious" bodily or mental harm was committed to meet the requirements of the crime of genocide). Moreover, the IACtHR may be of enormous use when determining the "harm suffered" by child victims, in order to determine whether a child is a victim under Rule 85 of the RPE, and thus eligible to participate in proceedings or receive reparations.

3.5.4 European Human Rights System

Unlike its counterpart in the Inter-American system, the European Convention does not have a specific provision regarding children. Nevertheless, in the words of Judge Jean-Paul Costa of the ECtHR, Article 1 of the European Convention[166] provides that States shall secure the rights and freedoms of "everyone", which ultimately includes children too.[167] Furthermore, the ECtHR has often relied on the CRC as guidance in the application of the provisions of the European Convention. In the last decade, the ECtHR, as an organ of the Council

164 *Bulacio case,* Merits Reparations and Costs, Judgment of September 18, 2003 Series C No 100, para. 88.

165 *Street Children case* Merits, Judgment of November 19, 1999 Series C No 63, para. 84.

166 Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols No 11 and 14*(4 November 1950) ETS No 5.

167 Council of Europe, *International Justice for Children: Foreword by Jean-Paul Costa* (Vol 3 of Building a Europe for and with Children, Council of Europe 2008) 5.

of Europe system, has also worked closely with the Council of Europe Secretariat, particularly with its programme "Building a Europe for and with Children" in order to promote children's rights among its members States and also to improve accessibility of children in the European Human Rights system. Likewise, in accordance with the European Social Charter,[168] children's rights have also been analysed by the European Committee on Social Rights, which, unlike the ECtHR, has jurisdiction over collective complaints against State Parties to the European Social Charter.[169]

It is also important to point out that during the past years, other child-specific instruments have been adopted within the European Human Rights system. For example, in 1996, the European Convention on the Exercise of Children's Rights (ECECR) was adopted to guarantee children's access to judicial proceedings, namely family proceedings.[170] Some of the provisions of this convention could be of use in ICC proceedings. For example, Article 1, paragraph 6, of the ECECR states that nothing in the Convention prevents Parties from applying more favourable rules to the promotion and exercise of children's rights. It enshrines the principle that international legal instruments lay down minimum standards but that States (or international organisations such as the ICC) may go beyond those legal texts to guarantee children's rights. Article 3 of the ECECR provides the minimum standards on the child's right to be informed and to express his or her views in proceedings, particularly: the right to receive all relevant information, to be consulted and to express his or her views, and to be informed of the possible consequences of compliance with these views and possible consequences of any decision. In accordance with this Article, children are considered as having sufficient understanding and have procedural rights that should be granted to them.[171]Article 5 of the Convention further grants children other procedural rights, such as the right to apply to be assisted by an appropriate person of their choice in order to help them express their views and the right to apply themselves, or through other persons or bodies (not necessarily parents or guardians) for the appointment of a separate representative (other than that of their parents). The ECECR also provides minimum guidelines to be followed by the judicial authorities before making a decision. In Article 6, the ECECR states that judges shall consider whether they have sufficient information to make a decision in the best interests of the child, or otherwise, obtain further information. It also obliges judges to ensure that the child has received all relevant information and has consulted with the child in person, where appropriate and allow the child

168 Council of Europe, *European Social Charter* (18 October 1961) ETS No 35 and revised ETS No 163.

169 Council of Europe, *International Justice for Children: Foreword by Jean-Paul Costa* (Vol 3 of Building a Europe for and with Children, Council of Europe 2008) 12.

170 Council of Europe, *ECECR* (25 January 1996) ETS No 160.

171 Council of Europe, *The ECECR, Explanatory Report* <http://conventions.coe.int/Treaty/en/Reports/Html/160.htm> accessed 8 August 2013.

to express his or her views. The above standards set by the ECECR could be of guidance for ICC proceedings dealing with child victims and witnesses.

The Council of Europe also adopted in 2007 the "Convention on the Protection of children against Sexual Exploitation and Sexual Abuse", which provides a legal framework for the prevention and protection of children against this abuse, but also for the punishment of these crimes, including against legal persons or corporations. Importantly, this Convention contains guidelines regarding the investigation, prosecution and procedural measures that could be taken into consideration when dealing with sexual exploitation and abuse against children in ICC proceedings.[172]

The Parliamentary Assembly of the Council of Europe adopted Recommendation 1864 (2009) "Promoting the participation by children in decisions affecting them", which could also be of guidance for the ICC.[173] In Recommendation 1864, the Council of Europe highlighted the need for State Parties to the Council to implement the ECECR and also Article 12 of the CRC, which deals with children's access to justice and their participation in judicial proceedings.[174] The Recommendation urges all decision-makers to seriously consider the opinions, desires and feelings of children, including very young children and ensure that participation is always voluntary and facilitated. Furthermore, the Recommendation proposes that children be able to express their views in a climate of respect, trust and mutual understanding and special attention is paid to avoid putting them at risk in any way.[175]

Moreover, in November 2010, the Committee of Ministers of the Council of Europe adopted a series of guidelines on child friendly justice.[176] This document, which will be analysed more in detail in Chapters 5 and 6, provides recommendations on children's access to justice, including information on the judicial proceedings, protection, safety and participation from the initial proceedings (*i.e.* investigation) to the final phases (*i.e.* enforcement and execution of a decision).

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172 Council of Europe, *Council of Europe Convention on the Protection of children against sexual exploitation and sexual abuse (Lanzarote Convention)*, (25 October 2007) CETS No 201.

173 Council of Europe: Parliamentary Assembly, *Recommendation 1864(2009): Promoting the Participation by Children in Decisions Affecting Them* (13 March 2009) Doc.12080.

174 Paragraph 4 of the Recommendation reflects the clear and intrinsic relationship between the ECECR and Article 12 of the CRC: Whenever a decision which affects a child is taken, his or her opinions, wishes and feelings have to be duly taken into account, having due regard to his or her age and degree of maturity. Age and maturity must be considered together, and these two factors do not solely concern the child's intellectual capacity. The way in which children express their feelings, the development of their personality, their evolving capacities and their ability to confront various emotions and possibilities, are just as important.

175 Council of Europe: Parliamentary Assembly, *Recommendation 1864(2009): Promoting the Participation by Children in Decisions Affecting Them* (13 March 2009) Doc.12080, paras 5-7.

176 Council of Europe: Committee of Ministers, *Guidelines of the Committee of Ministers of the Council of Europe on Child-Friendly Justice* (17 November 2010).

Regarding the ECtHR's case law in relation to children, the ECtHR has adopted principles of interpretation and application of the law in order to protect children's rights that could be of guidance for the work of the ICC. Although this study does not intend to review all the abundant jurisprudence of the ECtHR that directly or indirectly relates to children's rights, it aims to analyse some key decisions that are of particular relevance and importance to the work of the ICC.

In what refers to *crimes committed against children*, the ECtHR has copious case law on torture, slavery and other violations of human rights that are also crimes within the ICC's jurisdiction. Thus, this abundant case law could be of use to define these ICC crimes. For example, in the case of *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, the ECtHR held that the State was responsible for torture when it detained an illegal immigrant, a 5-year old unaccompanied child, in an adult detention centre. It found that the child's detention and the conditions of her detention reflected a lack of humanity to such a degree, that it amounted to inhumane treatment.[177] In another case, that of *Siliadin v. France*, the ECtHR analysed modern slavery, in a case where a girl was subject to domestic slavery. In this case, the ECtHR defined "forced or compulsory" labour as "all work of service which is exacted from any person under the menace of any penalty for which the said person has not voluntarily offered himself". It then established that the fact that the victim was a child in a foreign country, with an illegal migratory status and thus feared arrest, created the "threat of penalty" element necessary for forced labour to exist.[178] These findings could not only be of use to define the crime of slavery or sexual slavery, but also to analyse the term of "consent" in crimes of sexual violence in general and in crimes of child recruitment.

In relation to *children's access to justice*, the ECtHR case law could be of use to determine the needs of children under Rule 86 of the Rules (and consequently protective and special measures under Rules 87 and 88 of the Rules) vis-à-vis the rights of the accused pursuant to Article 67 of the Rome Statute. For example, in the case of *S.C. v. the United Kingdom*, the ECtHR determined that in cases involving children, it is "essential that it be dealt with in a manner that takes full account of his age, level of maturity and intellectual and emotional capacities, and that steps are taken to promote his ability to understand and participate in the proceedings, (…) including conducting the hearing in such a way as to reduce as far possible his feelings of intimidation and inhibition". The ECtHR also referred to the concept of "effective participation", which in cases involving children "presupposes that the accused (a child) has a broad understanding of the nature of the trial process and of what is at stake for him or her". Most importantly, the ECtHR held that the said procedure must adapt to the child's needs (taking into consideration age, but

177 *Mubilanzila Mayeka and Kaniki Mitunga v Belgium* no 13178/03 ECHR 2006-XI, paras 55-58.
178 *Siliadin v France* no 73316/01 ECHR 2005-VII, paras 116-120.

also special conditions such as handicaps).[179] Although this case dealt with a child's right to participate in proceedings as a defendant, the same principle could apply for a child's right to participate in proceedings before the ICC as victim or witness in a case.

In the case of *S.N. v. Sweden*, the ECtHR referred to the right of child victims for protection in judicial proceedings vis-à-vis the rights of the defence.[180] In this case, which involved a 10-year old boy who had been victim of sexual violence, the ECtHR affirmed that when assessing the concept of "fair trial" for an accused, "certain measures may be taken for the purpose of protecting the victim, provided that such measures can be reconciled with an adequate and effective exercise of the rights of the defence". The ECtHR further stated that judicial authorities may be required to take measures which counter-balance the handicaps under which the defence labours.[181] Cases such as this one could be of use for the ICC to guarantee protection to child victims and witnesses, but also guarantee the accused's right to a fair trial. These counter-balancing measures are essential to guarantee victims participation, while protecting them (particularly those most vulnerable, such as children), and protect at the same time the accused's fundamental right to a fair trial. In fact, according to the Appeals Chamber of the ICC, counter-balancing measures are necessary to guarantee the rights of the accused in spite the non-disclosure of information to him/her.[182]

The case of *Bocos-Cuesta v. The Netherlands* could also be of guidance for ICC proceedings involving child victims of sexual violence. In this case, the ECtHR reiterated that the fact that the accused doesn't have access to examine the witness (a child victim of sexual abuse), does not *per se* lead to a violation of the accused's right to a fair trial. For example, the ECtHR referred to the possibility of having the previous interviews of child witnesses recorded or even transmitted via technical devices to the accused, to enable his defence to examine the witness or at least to follow their testimonies. Likewise, the ECtHR found that, although the accused's rights could be limited in order to protect vulnerable children from possible re-traumatisation, these decisions should be based on concrete evidence or for example, expert's opinion.[183]

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179 *SC v the United Kingdom* no 60958/00ECHR 2004-IV, paras 28-35.

180 *SN v Sweden* no 34209/96 ECHR 2002-V.

181 *SN v Sweden* no 34209/96 ECHR 2002-V, para. 47.

182 *Lubanga case* 'Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I entitled "Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008"' (21 October 2008) ICC-01/04 01/06-1486, para. 48.

183 *Bocos-Cuesta v the Netherlands* no 54789/00, 10 November 2005, paras 69-74. See also *PS v Germany* no 33900/96, 20 December 2001, in which the ECtHR held that in spite the due protection to child victims and witnesses, the rights of the defence to a fair trial had been violated.

The abovementioned cases are just some examples of the extensive jurisprudence of the ECtHR and the legal instruments of the Council of Europe that could be of use for the work of the ICC. In general, although the case law of the IACtHR and the ECtHR (and expectedly soon of their African counterpart) is regional and related to State responsibility, many of the principles and rights interpreted by these courts are of universal application and thus useful in ICC proceedings concerning children's rights. Although Article 21 of the Rome Statute is silent regarding regional or other international case law, the practice of the ICC judges so far has been to refer to this case law when applying and interpreting the law of the ICC.[184] However, this has been a discretionary power of the judges, and in fact, there is no settled rule as to what case law of the regional courts should be applied. Although perhaps not applicable law *per se*, it appears that this case law could be helpful as "guidance" for ICC judges, insofar as this is not contrary to the provisions of the Rome Statute. For example, when defining crimes under the ICC's jurisdiction, the regional case law could be of use, but must be read and analysed in light of the crimes as defined by the Rome Statute and the Elements of Crimes, and within the limits of the principle of legality enshrined in Article 22 of the Rome Statute. However, as regards other procedural aspects (*i.e.* protective measures versus rights of the accused), the case law of the regional human rights courts will most likely meet the Rome Statute's standards, and thus be more easily transposed to the ICC setting. Moreover, as regards reparations proceedings, which are clear human rights proceedings within ICC's criminal proceedings, the regional case law will most likely not only be in accordance with the Rome Statute, but also give greater specificity to the general ICC provisions in this regard (i.e. Article 75 of the Rome Statute).

3.5.5 Case Law of the Special Court for Sierra Leone

In the same manner in which regional human rights case law has no clear applicability in the ICC, the jurisprudence of other international criminal tribunals is also not strictly applicable law under Article 21 of the Rome Statute. In fact, although it could be used and has been used as "guidance" for the interpretation and application of ICC provisions, this is completely discretionary and in fact, in some instances judges have also disregarded established practice of other international tribunals when this has been inter-

184 See for example: *DRC Situation* 'Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6' (17 January 2006) ICC-01/04-101-tEN-Corr, paras 51-53; *Lubanga case* 'Decision on victims' participation' (18 January 2008) ICC-01/04-01/06-1119, para. 78; *Kenya Situation* 'Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya'(31 March 2010) ICC-01/09-19-Corr, paras 31-32.

preted as contrary to the Rome Statute.[185] So, although the current practice of the ICC is that Chambers, parties and participants, including the Appeals Chamber, have referred to such international case law, particularly of the ad-hoc tribunals but also the SCSL, there is no clear rule as to when this case law needs to be followed or disregarded.[186] In essence, it is a discretionary power of the judges of the ICC to refer to this case law, insofar as it is not contrary to the Rome Statute and applying the Appeals Chamber's ruling mentioned above, it could be used as "guidance" to interpret and apply ICC applicable law.

As regards children, the case law recently developed by the SCSL is certainly most significant for the work of the ICC, particularly in relation to the crimes of enlistment, conscription and use of children to participate actively in hostilities. In fact, all the accused before it have been charged with crimes of child recruitment.[187] Although the case law of other international tribunals, particularly the ad-hoc tribunals, could be useful for the interpretation, for example, of provisions of international humanitarian law contained in the Rome Statute, this section will focus on the jurisprudence of the SCSL, as it is the most relevant in respect to children. Moreover, most of the significant jurisprudence of the ad-hoc tribunals is already reflected in the Rome Statute and the RPE provisions (i.e. the crimes of sexual violence and the principles of evidence in cases of sexual violence). In the case of the SCSL, as noted by Trial Chamber I of the ICC in the Court's first ever conviction and sentence (which referred to the case law of the SCSL) although the decisions of other international tribunals are not part of the directly applicable law under Article 21 of the Rome Statute, the case law of the SCSL could potentially assist in the interpretation of the

185 See for example *Lubanga case* 'Decision on the Practices of Witness Familiarisation and Witness Proofing' (8 November 2006) ICC-01-04 01-06-679. This decision prohibited the procedural practice of "witness proofing" which is well established and unquestioned in the ad-hoc tribunals. As will be analysed further in Chapter 5, more recently the Trial Chamber in the Kenya situation cases has allowed this practice, albeit by the name of "witness preparation".

186 See for example, *Lubanga case* 'Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled "First Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81"' (14 December 2006) ICC-01/04 01/06-773, para. 20; *Katanga and Ngudgolo case* 'Judgment on the appeal of Mr Germain Katanga against the decision of Pre-Trial Chamber I entitled "Decision on the Defence Request Concerning Languages"' (27 May 2008) ICC-01/04-01/07-522 paras 16 and 48; *Lubanga case* 'Judgment on the appeal of Mr Lubanga Dyilo against the Oral Decision of Trial Chamber I of 18 January 2008' (11 July 2008) ICC-01/04-01/06-1433, para. 78. Drumbl has noted that the references to SCSL case law in ICC rulings suggests "the interactive nature of the jurisprudence of these two institutions". See: Mark Drumbl, *Reimagining Child Soldiers in International Law and Policy* (Oxford University Press 2012) 152.

187 Naïri Arzoumanian and Francesca Pizzutelli, 'Victimes et Bourreaux: Questions de Responsabilité Liées à la Problématique des Enfants-Soldats en Afrique' (December 2003) *Revue du Comité International de la Croix Rouge*, Vol 85, 827.

Rome Statute's provisions as the crimes of child recruitment are identically defined in both Statutes of the SCSL and the ICC.[188]

The first major judgment of the SCSL is that of the Appeals Chamber of 31 May 2004, in which it decided on a preliminary motion by the accused which contended that the principle *nullum crimen sine lege* had been violated because the act of child recruitment was not a crime under customary international law at the time of the alleged commission. The SCSL Appeals Chamber concluded that the crime of child recruitment was crystallised as international customary law, regardless of whether it had been committed in internal or international armed conflict, even before the adoption of the Rome Statute in 1998.[189]

The first conviction in the SCSL (and first ever conviction for crimes of child recruitment) was the Judgment of 20 June 2007, in which Trial Chamber II of the SCSL in the case of Brima, Kamara and Kanu, also known as the Case of the Armed Forces for Revolutionary Council ("*AFRC Case*"), found that the accused were individually criminally responsible for conscripting children under the age of 15 years into an armed group and/or using them to participate actively in hostilities.[190]

> Since the SCSL adopted the elements of the crime in accordance with the Rome Statute and the Elements of Crimes, the above case law could be helpful for the interpretation of the ICC provisions in future judgments before this Court.

Of particular importance is the SCSL jurisprudence as regards to crimes of sexual violence committed against girls that are abducted in armed conflict.

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188 *Lubanga case* 'Judgment pursuant to Article 74 of the Rome Statute' (14 March 2012) ICC-01/04-01/06-2842, para. 603. See also, *Lubanga case* 'Decision on Sentence pursuant to Article 76 of the Rome Statute' (10 July 2012) ICC-01/04-01/06-2901, paras 12-15.

189 The SCSL Appeals Chamber found that the fact that 187 States were parties to the 1949 Geneva Conventions, and 137 States were parties to Additional Protocol II to the Geneva Conventions, and that all but 6 States had ratified the CRC at that time, and that the African Charter on the Rights and Welfare of the Child had been adopted and prohibited such practice, as well as the widespread prohibition of recruitment or voluntary enlistment of children under the age of fifteen in domestic legislations, all lead to the conclusion that the prohibition of child recruitment was crystallised under international customary law, even before the adoption of the Rome Statute in 1998. See: The Prosecutor v Sam Hinga Norman 'Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment)' (31 May 2004) SCSL 04-14-131 paras 10-24.

190 As will be studied further in Chapter 4, the Trial Chamber determined that the *actus reus* of the crime was satisfied by either enlisting, or conscripting children under the age of fifteen or by using them to participate actively in hostilities and that enlistment entails accepting and enrolling individuals when they volunteer to join an armed force or group. In what refers to the concept of "conscription" the Trial Chamber concluded that this conduct encompasses acts of coercion, such as abductions and forced recruitment, by an armed group against children, committed for the purpose of using them to participate actively in hostilities. The Prosecutor v Brima et al ("*AFRC case*") 'Sentencing Judgment' (19 June 2007) SCSL 04-16-624, 711, 729, 733 and 734.

Although this jurisprudence will be further analysed in Chapter 4, it is important to note that the SCSL case law could be of use for ICC cases involving crimes of sexual violence committed against girl-child recruits. Moreover, the case law of the SCSL could be helpful to interpret crimes against humanity of sexual slavery and also the crime of "forced marriage" or " forced conjugal association" as defined by the SCSL, to define "other forms of sexual violence" under the Rome Statute.[191]

Three other cases and convictions have followed after the *AFRC case*.[192] Although the SCSL is now completing its mission and its case law will thus be limited to these four cases, its findings could still be of relevance, at least for the purposes of the first cases before the ICC, as was the case of the Lubanga judgment, in which, as noted above, the Trial Chamber referred to the SCSL's case law on the subject of child recruitment.

3.6 Conclusions

Article 21 of the Rome Statute provides a system of applicable law in which the Rome Statute appears to be the pinnacle of the legal hierarchy. However, upon a closer analysis of this provision, particularly paragraph 3, it is clear that internationally recognised human rights are the "chapeau" of this legal provision and that all interpretation and application of the law is subject to these human rights standards. Referring to children's rights, this means that internationally recognised instruments such as the CRC should guide the

191 *AFRC case* 'Separate Concurring Opinion of Justice Julia Sebutinde Appended to Judgment Pursuant to Rule 88 (c)' (19 June 2007) SCSL 04-16-624 para. 16 and 'Partly Dissenting Opinion of Justice Doherty on Count 7 (sexual slavery) and Count 8 ('forced marriages')' (19 June 2007) para. 49; The Prosecutor v Charles Taylor (*Taylor case*) 'Judgment' (18 May 2012) SCSL03-01-1281, paras 422 and 426.

192 The second conviction came on 2 August 2007 judgment, when Trial Chamber I of the SCSL in the case of Fofana and Kondewa known as the Civil Defence Forces ("*CDF Case*"), found the accused Kondewa guilty by majority of '(e)nlisting children under the age of 15 years into armed groups and/or using them to participate actively in hostilities, and other serious violations of international humanitarian law'. In this judgment, the Trial Chamber referred to the general concept of 'recruitment', and came to the conclusion that this term encompasses 'conscription', 'enlistment' and the 'use of children to participate actively in hostilities'. On 2 March 2009, Trial Chamber I of the SCSL in its judgment in the case of Sesay, Kallon and Gbao, also known as the Revolutionary United Front ("*RUF Case*") found the accused individually, criminally responsible for the crime of conscription and enlistment of children under the age of 15 years into armed forces or groups, and of using them to participate actively in hostilities, and other serious violations of international humanitarian law. The findings of the SCSL in the *Taylor case* are also relevant, as the judges analysed the crime of child recruitment, among other crimes. See: The Prosecutor v Moinina Fofana and Allieu Kondewa ("*CDF case*") 'Judgment' (2 August 2007) SCSL 04-14-785, 191, 192, and 291; The Prosecutor v Issa Hassan Sesay et al ("*RUF Case*") 'Judgment' (2 March 2009) SCSL 04-15-1234; *Taylor case* 'Judgement' (18 May 2012) SCSL 03-01-1281 and 'Sentencing Judgment' (30 May 2012) SCSL03-01-1285.

interpretation and application of all provisions within the Rome Statute and other ICC legislation. In fact, one could argue that a statutory provision could become inapplicable if its application would be contrary to the CRC in a given context.

As for other "soft law" children's rights instruments (*i.e.* the Paris Principles), although the ICC is not bound to apply them, it may use them as guidance in order to apply and interpret the ICC's applicable law. This is a discretionary power that the judges of the ICC have, insofar as the "guidance" provided by these instruments is not contrary to the Rome Statute and other applicable law under Article 21(3) of the Rome Statute.

Most importantly, this Chapter has demonstrated that taking into consideration the experience of other international, national and regional tribunals, inasmuch as they are compatible with internationally recognised human rights and the Rome Statute, is not only permissible but also recommendable. Although human rights instruments and case law have to be adapted to the ICC's legal framework (*i.e.* State vs individual responsibility) and with due regard to Article 22 of the Rome Statute containing the principle of legality, its findings could be of use when giving concrete and more specific content to general provisions such as Rule 85 of the RPE, which defines the concept of "victim" or when deciding on reparations measures pursuant to Article 75 of the Rome Statute.

It is important to note, however, that the instruments and case law analysed above are far from being all-inclusive. Applicable law or guidance instruments will vary, depending on the case at hand. The list of "applicable law" under Article 21(3) of the Rome Statute is dynamic, ever-changing and in constant progression. Insofar as developing human rights law achieve the "internationally recognised" level, their application is compulsory under the Rome Statute. As for the other "guidance" human rights instruments, as long as they are not contrary to the Rome Statute and insofar as the interpretation of crimes within the ICC's jurisdiction adheres to the principle of legality, its application by ICC judges will be discretionary. Therefore, it is important for judges, prosecutors, counsel and ICC staff in general to be attentive to the developments in international human rights law, in order to progress the law established in the Rome Statute in 1998, which should not remain "set in stone", particularly not regarding internationally recognised human rights, pursuant to Article 21(3) of the Rome Statute.

4 Crimes under the jurisdiction of the ICC and children

4.1 INTRODUCTION

The ICC has jurisdiction over crimes of genocide, crimes against humanity, war crimes and the crime of aggression.[1]

The jurisdiction *rationae temporis* of the ICC extends to crimes committed after the entry into force of the Rome Statute, 1 July 2002. However, for all other States that have become State Parties to the Rome Statute after that date, the ICC has jurisdiction over crimes committed after the entry into force of the Rome Statute for that State.[2] Non-State Parties or new State Parties may make a declaration accepting the jurisdiction of the ICC from an earlier date or for specific crimes, in accordance with Article 12, paragraph 3 of the Rome Statute.

Regarding its territorial jurisdiction, the ICC may exercise its jurisdiction if the crime was committed in the territory of a State Party or in the territory of a State that has accepted the ICC's jurisdiction. Likewise, the ICC has jurisdiction *rationae personae* in relation to crimes committed by a national of a State Party or of a State that has accepted its jurisdiction.[3]

The only exception to these two preconditions for the exercise of the ICC's jurisdiction is the referral of a situation to the Prosecutor by the UNSC, acting under Chapter VII of the UN Charter, in accordance with Article 13(b) of the Rome Statute. In view of this provision, the ICC holds a broader jurisdiction in relation to the situations referred by the UNSC.

This Chapter analyses the definition of particular crimes under the ICC's jurisdiction that affect children. While this Chapter focuses primarily on crimes affecting children exclusively or disproportionately vis-à-vis adults, it is clear that children, as any human being, can be victims of any crime within the jurisdiction of the ICC.

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1 This section very briefly synthesises the main aspects of the ICC's jurisdiction. However, for further in-depth analysis of the topic, the reader is referred to the following literature: Otto Triffterer (ed), *Commentary on the Rome Statute of the ICC: Observers' Notes, Article by Article* (2nd Edn, Nomos Verlagsgesellschaft 2008) 129-142 and 539-700; William Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (Oxford University Press 2010) 101-118 and 273-372.

2 Rome Statute, article 11(2).

3 Rome Statute, article 12.

Although the analysis contained in this Chapter focuses on substantive criminal law, it also has a bearing in the procedural aspects of children's interaction with the ICC analysed throughout this research. A child will be defined as a "victim", pursuant to Rule 85 of the RPE or Article 75 of the Rome Statute, depending on the definition given to the crime he/she suffered and the determination of the harms suffered as a result of that crime. This, since these provisions establish that there must be a causal link between the crimes allegedly committed and the harms suffered by victims.[4]

Moreover, the ICC must protect child victims and witnesses' physical and mental well-being throughout all stages of their involvement with the ICC, pursuant to Article 68(1) of the Rome Statute. Because of their age (in addition to their cultural and socio-economic background and gender), children will suffer the negative consequences of crimes differently from adults and thus, the ICC must address these particular needs of child victims and witnesses. For example, in order to decide on judicial and non-judicial protective and special measures for child victims of crimes, the ICC needs to understand the nature of the crimes committed against these children. Only if ICC staff, including persons working with the VWU, OPCV and the VPRS, among others, understand the harms suffered by children as a consequence of crimes within the jurisdiction of the ICC, will the ICC be able to guarantee a sound judicial environment in which children can participate in proceedings as victims and witnesses pursuant to Rule 86 of the RPE.

As noted above, all crimes within the ICC's jurisdiction are crimes that could affect children either as direct or indirect victims. However, for the purposes of this Chapter, only some underlying acts within the crimes of genocide, crimes against humanity and war crimes will be analysed: namely those in which children are a material element of the crime (child recruitment and forced displacement of children), and those crimes which disproportionately affect children (such as sexual violence and attacks against certain civilian objects such as schools).[5] However, taking into consideration that current armed conflicts predominantly victimise civilians and non-combatants, it is foreseeable that most crimes within the Rome Statute's jurisdiction will significantly affect children, as they represent a considerable part (if not the majority) of the civilian population. However, as noted above, a children's dimension of all crimes within the jurisdiction of the ICC should not be disregarded.

4 Kai Ambos, The first Judgment of the International Criminal Court (Prosecutor v. Lubanga): A Comprehensive Analysis of the Legal Issues, *International Criminal Law Review*, Vol. 12, No. 2 (2012).

5 Though the crimes in the Rome Statute are categorised under the crimes of genocide, war crimes, crimes against humanity and aggression, this Chapter will not deal with the general elements of these crimes, but only with the conduct affecting children. For example, in the analysis of child recruitment, the contextual elements of armed conflict will not be analysed, but only the elements concerning the conduct of enlistment, conscription and use of children to participate actively in the hostilities.

Children will be affected by crimes within the ICC's jurisdiction differently than adults. Thus, all investigations and trials before the ICC should ideally take into account a "children's dimension" of crimes. When investigating or prosecuting any international crime, investigators, prosecutors, judges and counsel should bear in mind that children are very often affected by international crimes, but may not directly approach the ICC because of their age. Although in the *Lubanga case*, the *Katanga case and the Ngudjolo case*, which encompass crimes committed against children (*i.e.* child recruitment), children have participated as victims and witnesses, in other cases children may not participate at all.[6] However, this does not exempt the ICC from considering the impact these crimes have upon children. What happened to the children of the adult victims of other ICC crimes? This is a question that ICC investigators could pose, but also judges, who pursuant to Article 69(3) of the Rome Statute shall determine the truth.

4.2 WHO ARE THE VICTIMS OF CRIMES COMMITTED AGAINST CHILDREN?

Children, but also their parents and family members, as well as their community, are affected by crimes committed against children. These crimes not only affect their childhood, their youth, and therefore their right to have an adequate development, but also affect their family life and their interaction with their community. Crimes against children affect the communities' future citizens and often deprive an entire generation within a community of their fundamental rights.

Recruitment of children in armed groups is prohibited because it violates children's rights to physical and psychological health, education, and family life, among others. Therefore their recruitment is prohibited, as it destroys childhood, and prematurely enters children into adulthood, along with all the psychological and physical effects this encompasses.[7] Triffterer's Commentary to the Rome Statute supports this argument with the following statement: "(b)esides the risk to their physical well-being, active participation in armed hostilities teaches them the rule and culture of violence, disrupts their education and frequently results in grave traumas, because children are even less capable to deal with the horrors of war than grown adults."[8] In fact, a court expert in the *Lubanga case* at the ICC suggested that children associated with armed groups are exposed to consequences which destroy the valuable child-

6 See for example the case of the Prosecutor v Jean-Pierre Bemba, ICC-01/05 01/08 ("*Bemba* case"), which encompasses crimes of pillage, murder and rape.

7 Ann Davison, 'Child Soldiers: No Longer a Minor Incident' (2004) *Willamette Journal of International Law and Dispute Resolution*, 125.

8 Michael Cottier, "(xxvi) Participation of Children in Hostilities" in: Otto Triffterer (ed), *Commentary on the Rome Statute of the ICC: Observers' Notes, Article by Article* (2nd Edn, Nomos Verlagsgesellschaft 2008) 467.

hood of a person's life, and deprives them of key services such as education and healthcare.[9]

The legal provisions that punish crimes committed against children also protect the parents and other family members of the child victims of these crimes, particularly in what refers to their family life, their ties and overall well-being, which are affected by the commission of a crime against a young family member. In the *Lubanga case*, which exclusively dealt with recruitment of children, Trial Chamber I determined that parents acting on behalf of their children who also claimed to have suffered harm as a result of their child's alleged recruitment could be granted status to participate as victims in the proceedings.[10] The same Chamber determined in fact that the harm to children and their parents is presumed, stating that recruitment of children under the age of 15 to participate actively in the hostilities, *ipso facto,* will have resulted in some form of physical or psychological injury or harm to the child, or his/her parents (or both), regardless of whether specific harm or injury was set out in the victim's application form.[11]

The community where children live could also be considered a victim of crimes committed against its youngest members. Crimes committed against children often disrupt the healthy functioning of the community as a society, in view of the fact that children are the future of the community and how they can contribute to it may be seriously hampered by these crimes. In this sense, the expert witness on children and post-traumatic stress disorder who appeared in the *Lubanga case* stated, regarding child recruitment and its effects on its victims and communities:[12]

> "(The communities) "lose a critical mass of the young people who could be productive agents for future development. You lose them as active agents, as productive people in society."

Although it could be argued that all crimes within the jurisdiction of the ICC affect the communities in which they occur, systematic crimes committed against children and which target children have longer-lasting effects in society, as children are still developing, and thus crimes could have greater impact on them and on their future function as members of society. In fact, the same

9 Elisabeth Schauer, *The Psychological Impact of Child Soldiering*, Report of Ms Elisabeth Schauer following the 6 February 2009 "Instructions to the Court's expert on child soldiers and trauma" ICC-01/04-01/06-1729-Anx1, 25 of February 2009) 3.

10 *Lubanga case* 'Decision on the applications by victims to participate in the proceedings' (15 December 2008) ICC-01/04 01/06-1556-Corr, para. 118.

11 *Lubanga case* 'Decision on the applications by victims to participate in the proceedings' (15 December 2008) ICC-01/04 01/06-1556-Corr, para. 120. See also: *Lubanga case* 'Decision on indirect victims'(8 April 2009) ICC-01/04-01/06-1813 para. 50.

12 *Lubanga* case, Transcript of hearing (7 of April 2009) ICC-01/04-01/06-T-166-ENG, 33 lines 8-14.

court expert who appeared in the *Lubanga case* stated that during childhood and adolescence the mind and brain are particularly flexible and therefore stress has the greatest potential to affect cognitive and affective development. She explained that due to the exposure to stress during this developmental period, the brain could develop along a stress-responsive pathway that is associated with increased risk of developing serious medical and psychiatric disorders, for example, intense aggressiveness or fear.[13] It could be foreseeable then, that children who have developed in an environment of massive crimes and armed conflict could have difficulties as adults in recognizing basic moral principles, such as respect to human dignity and to human life. In many developing countries, where children represent more than half of the population, such adverse effects in children could have devastating effects to the future of communities as a whole.[14]

Likewise, in crimes such as child recruitment, the community and civilian population in general is a victim of this crime because children can be fierce soldiers that do not distinguish between right and wrong and between combatants and civilians as adults may do, since they do not necessarily have completed their ethical and moral development.[15] Triffterer's Commentary of the Rome Statute stresses this point of view, stating that social reintegration poses particular problems for children who have never seen anything else but conflict and violence. Also, children's combat behaviour is more erratic; they may more easily shoot indiscriminately at anything that moves. Because their conduct is more difficult to predict, they can present an increased danger for persons protected under humanitarian law, including civilians, humanitarian workers or persons *hors de combat*."[16] This is also echoed by the Special Representative of the Secretary General of the UN for Children and Armed Conflict, Ms Coomaraswamy, who participated as an expert witness in the *Lubanga case* and who stated during her intervention in that trial that children

13 Elisabeth Schauer, *The Psychological Impact of Child Soldiering*, Report of Ms. Elisabeth Schauer following the 6 February 2009 "Instructions to the Court's expert on child soldiers and trauma" ICC-01/04-01/06-1729-Anx1, 25 of February 2009) 17.

14 For example, in the DRC, 44% of the population are between 0-14 years old and the median national age is 17 years. This means that in the DRC, at least 44% of its population was born after the Mobuto era and thus has suffered from the various armed conflicts that have raged the country since 1996. For background information on the First Congo War in 1996 see: Human Rights Watch, *The War <http://www.hrw.org/legacy/reports/1997/zaire/Zaire-05.htm>* accessed 8 August 2013. See also: CIA World Fact Book, *Africa: Congo, Democratic Republic of the <https://www.cia.gov/library/publications/the-world-factbook/geos/cg.html>* accessed 8 August 2013.

15 Alison Dundes Renteln, 'The Child Soldier: The Challenge of Enforcing International Standards' Sixteenth Annual International Law Symposium "Rights of Children in the New Millennium" (Fall 1999) *Whittier Law Review*, 192.

16 Michael Cottier, "(xxvi) Participation of Children in Hostilities" in: Otto Triffterer (ed), *Commentary on the Rome Statute of the ICC: Observers' Notes, Article by Article* (2nd Edn, Nomos Verlagsgesellschaft 2008) 467.

under 18 years and certainly those under 15 years of age have an underdeveloped notion of death, which makes them fearless in battle, often thinking of it as a game, rushing straight into the line of fire.[17] Abbott also stresses that military groups use children because they consider them "expendable, less demanding and easier to manipulate than adult soldiers".[18] As noted by the author, the tendency to use child soldiers in armed conflicts, coupled with drugs and alcohol, transforms children into valuable and desensitized executioners, assassins and combatants for warring parties.[19] Fujio also notes that children tend to be more easily manipulated and tricked into believing what adults tell them and can be moulded into effective and expendable fighters.[20]

It is thus clear that crimes committed against children affect their entire social structure and very often change ordinary social hierarchies (*i.e.* by giving a child a weapon) that can no longer be reset once the armed conflict or crimes have ceased. It also has a generational effect, since many child victims of armed conflict will have their education and healthcare limited or completely annulled, all of which will have consequences for generations to come.

The ICC needs to consider the multiple effects that crimes committed against children have. Only if the effects of crimes against children are integrally understood, judicial proceedings at the ICC will meet the needs of children pursuant to Rule 86 of the RPE. Likewise, only if there is a comprehensive knowledge of the harms suffered by children, their families and their communities, will reparations be meaningful for all these victims and aim to restore the peace that was affected by the commission of these crimes.[21]

17 *Lubanga case,* Transcript of hearing (7 January 2010) ICC-01/04-01/06-T-223-ENG, 11 lines 22 *et seq.* See also International Bureau for Children's Rights, *Children and Armed Conflict: A Guide for International Humanitarian and Human Rights Law* (Canada 2010) 132-133.

18 Amy B Abbott, 'Child Soldiers – The Use of Children as Instruments of War' (Summer 2000) *Suffolk Transnational Law Review*, 507.

19 Amy B Abbott, 'Child Soldiers – The Use of Children as Instruments of War' (Summer 2000) *Suffolk Transnational Law Review*, 510.

20 Christy Fujio, 'Invisible soldiers: how and why post-conflict processes ignore the needs of ex-combatant girls' (Fall 2008) *Journal of Law and Social Challenges*, 4.

21 The Preamble of the Rome Statute recognized that the crimes within the jurisdiction of the ICC "threaten peace, security and well-being of the world".

4.3 INTERNATIONAL CRIMES IN WHICH CHILDREN ARE A MATERIAL ELEMENT OF THE CRIME

4.3.1 Genocide by forcibly transferring children of the group to another group

4.3.1.1 Brief note on the crime of genocide in general

Article 6 of the Rome Statute defines the crime of genocide as an act "committed with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such". Article 6 includes as conduct of genocide the following: (a) killing members of the group; (b) causing serious bodily or mental harm to the members of the group; (c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) imposing measures intended to prevent births within the group; and (e) forcibly transferring children of the group to another group.

This crime in general has four elements: a) the group (national, ethnical, etc.); b) the intention (to destroy in whole or in part), c) the context (in an emerging pattern of similar conduct directed against that group or that the conduct itself effect destruction); and d) the conduct (killing, rape, etc.).[22]

It is important to highlight several considerations in light of the Elements of Crimes. First of all, according to this legal instrument of the ICC, the crime of genocide is committed when one or more persons are victims of the crime (*i.e.* "the perpetrator killed one or more persons").[23] Thus, the crime of genocide has a group element.

It is also essential to take note of footnote 3 of the Elements of Crimes, which includes as conducts within "causing serious bodily or mental harm", acts such as "torture, rape, sexual violence or inhumane or degrading treatment". Though these conducts are not further defined, the concepts contained in Article 7 of the Rome Statute, relating to crimes against humanity, may be applicable, as this provision defines terms such as enslavement, torture, and forced pregnancy.[24] Crimes of sexual violence committed against children, either in the context of genocide or crimes against humanity, will be analysed further in the following section of this chapter.

Also, in relation to the act of genocide to deliberately inflict conditions of life calculated to bring about physical destruction, it is important to notice that footnote 4 of the Elements of Crimes defines "conditions of life" as "resources indispensable for survival, among others food and medical services,

22 ICC, *Elements of the Crimes* (Official Records of the Review Conference of the Rome Statute of the International Criminal Court, Kampala, 31 May-11 June 2010*)* (Elements of the Crimes) RC/11, article 6, Introduction.

23 Elements of the Crimes, article 6(a).

24 Rome Statute, article 7(2).

or systematic expulsion from homes". This crime could of course have particular effects on children, because they have particular medical, hygienic and nutritional needs, among others, that differ from the adult population. It could also be argued that the threshold for the commission of this crime will be lower when committed against children (particularly young children), as they have more indispensable needs than adults which also have more enduring effects (*i.e.* genocide committed by depriving victims of food could have devastating consequences in the cognitive and physical development of children due to malnutrition).

Another conduct within genocide, that of imposing measures intended to prevent births within a group, could also be considered as affecting children, because it prevents the birth of children within a certain group. However, due to the polemic consequences of any discussion involving unborn children vis-à-vis the right to abortion, this research will focus on crimes in which born children are affected. Notwithstanding the limitations of this research, this could be an interesting topic to consider if these charges are ever brought before the ICC.

Notwithstanding the importance and negative effects that the conducts within the crime of genocide included in Article 6 of the Rome Statute have on children's lives, this section will focus on the crime of "forcible transfer of children", because in this crime children are a material element of the crime as it specifically requires that the crime is inflicted on children under the age of 18 years. However, as will be explained below, age determination in this crime is perhaps not as challenging as in the crime of recruitment, because child victims of this crime will most likely be very young children.

4.3.1.2 The act of genocide of "forcible transfer of children"

Article 6 of the Rome Statute prohibits the act of genocide by forcibly transferring children as follows:[25]

> 'Article 6 Genocide
> For the purpose of this Statute, 'genocide' means any of the following acts committed with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group as such:
> (…) (e) Forcibly transferring children of the group to another group.
> According to the Elements of Crimes (footnote 5), forcible transfer of children "is not restricted to physical force, but may include threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or persons or another person, or by taking advantage of a coercive environment". On this same line of thought, the judges of the ICTR established that the objective of this provision is not only to "sanction

25 Rome Statute, article 6(e).

> a direct act of forcible physical transfer, but also to sanction acts of threats or trauma which would lead to the forcible transfer of children from one group to another".[26]

The Elements of the Crimes also establish that a "child", for the purposes of Article 6(e) is a person under the age of 18 years. As with the *mens rea* of the crimes of child recruitment analysed above, the Elements of Crime lower the threshold of Article 30 of the Rome Statute, establishing that the perpetrator either "knew or should have known" that the person or persons were under the age of 18 years. Commentators, such as Schabas, have stated that this provision of the elements of crimes is inconsistent with Article 30 and could be considered *ultra vires*. Schabas argues, however, that this is unlikely to have any real consequence, since this crime refers to young children who are transferred from a group to another resulting in a loss of their original identity. This crime is thus improbable to apply in reality to adolescents and thus Schabas argues, the issue of mistake of fact about the age of a teenage child, resulting from a lack of due diligence, would never arise.[27]

Although, as stated by Schabas, this crime could be in reality inapplicable for adolescents, it is still important that such apparent legal contradictions between the Elements of Crimes and the Rome Statute are analysed and reconciled.[28] The same arguments could apply to resolve the friction between Article 30 of the Rome Statute and the Elements of Crimes of Article 8(2), (b)(xxvi) and (e)(vii), which will be further analysed in the following section.

4.3.2 Enlistment, conscription and use of children under the age of fifteen to participate actively in the hostilities

Article 8 of the Rome Statute prohibits recruitment and use of children under the age of 15 as follows:[29]

> 'Article 8 War crimes
> 1. The ICC shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes.

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26 ICTR, *Akayesu case,* 'Judgement' (2 September 2008) Case No ICTR-96-4-T, para. 509.

27 Schabas in: Otto Triffterer (ed), *Commentary on the Rome Statute of the ICC: Observers' Notes, Article by Article* (2nd Edn, Nomos Verlagsgesellschaft 2008) 154; William Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (Oxford University Press 2010) 133.

28 For example Sonja Grover suggests that children, including adolescents forcibly recruited by armed groups, could be considered as victims of the crime of genocide of forcible transfer of children. See Sonja Grover, *Humanity's Children 'ICC Jurisprudence and the Failure to Address the Genocidal Forcible Transfer of Children'* (Springer 2013) 97-196.

29 Rome Statute, Article 8(2), subparagraphs b(xxvi) and e(vii).

> 2. For the purpose of this Statute, "war crimes" means:
> (…) (b) Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts:
> (…) (xxvi) Conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities.
> (…)
> (e) Other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law, namely, any of the following acts:
> (…)
> (vii) Conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities; (…)'

To date, there are two cases at the ICC in which charges of enlistment, conscription and use of children have stood trial.[30] However, as will be analysed below, so far only the Trial Chamber I in the *Lubanga case* has made a comprehensive analysis of this crime in the ICC's first-ever conviction. Thus, although the ICC judges have already determined some of the aspects that will be analysed below, these may be upheld or quashed by the Appeals Chamber of the ICC in the appeals proceedings pending in the *Lubanga case.* Moreover, depending on how future charges for these crimes are presented in future cases (*i.e.* in order to include sexual violence within the "facts and circumstances" of the charges) some aspects which were not encompassed in the ICC's first trial, could be of relevance in future ICC cases.

4.3.2.1 Nature of the crimes of enlistment, conscription and use of children to participate actively in the hostilities

These three conducts of, a) enlisting, b) conscripting and c) using children to participate actively in hostilities, all have in common the principle of international humanitarian law that prohibits the participation of children in combat, as it is considered an inhuman practice.[31] In this sense, the crime encompasses the principle of non-recruitment, which prohibits both compulsory and voluntary enlistment of children, as well as their taking part in hostilities. Although the Additional Protocol 1 to the Geneva Conventions and other prior legal instruments use the concept of "recruitment", the Rome Statute contains the words "enlistment" and "conscription". However, as noted by the SCSL case law referred to in the previous Chapter, prohibition of these crimes is not new to the ICC Statute, and is a well-established principle of international

30 *Lubanga* case and *Katanga and Ngudjolo* case.

31 Jean Pictet and others, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (International Committee of the Red Cross 1987) 900.

customary law. Hence, the Rome Statute did not prohibit child recruitment for the first time, but distinctly defined this crime in an international treaty.

In its judgment of 31 May 2004, the Appeals Chamber of the SCSL decided on a preliminary motion by the accused that contented that the principle *nullum crimen sine lege* had been violated because the act of child recruitment was not a crime under international customary law at the time of the alleged commission. The SCSL Appeals Chamber concluded that the crime of child recruitment was crystallised as international customary law, regardless of whether it had been committed in internal or international armed conflict.[32] It is important to note that the SCSL Appeals Chamber found that "States clearly consider themselves to be under a legal obligation not to practice child recruitment".[33] As stated before, in the first-ever conviction before the ICC, the Trial Chamber used the SCSL case law as guidance for the interpretation of the Rome Statute's provisions.[34] The Trial Chamber also referred to the CRC, the Additional Protocol II to the 1949 Geneva Convention, as well as to the CRC Optional Protocol on Involvement of Children in Armed Conflict, and the African Charter on the Rights and Welfare of the Child, thus in a sense acknowledging that the definition of the crime of child recruitment may be found beyond the Rome Statute, in these other international treaties, particularly as neither the Rome Statute nor the Elements of Crimes really define this criminal conduct.[35]

4.3.2.2 Conscription and enlistment and the controversial element of "voluntariness"

Pursuant to Article 21 of the Rome Statute, ICC judges may apply other sources of law in order to define and differentiate the concept of "enlistment" and "conscription". Most importantly, although a general concept of the crime may be possible to achieve, judges will need to take into consideration the facts and circumstances of each case (*i.e.* considering the multiple tasks that children

32 The SCSL Appeals Chamber found that the fact that 187 States were parties to the 1949 Geneva Conventions, and 137 States were parties to Additional Protocol II to the Geneva Conventions, and that all but 2 states had ratified the CRC, and that the African Charter on the Rights and Welfare of the Child had been adopted and prohibited such practice, as well as the widespread prohibition of recruitment or voluntary enlistment of children under the age of 15 in domestic legislations, all lead to the conclusion that the prohibition of child recruitment was crystallised under international customary law, even before the adoption of the Rome Statute in 1998, and at least as early as 1996, when the jurisdiction of the SCSL started. See: The Prosecutor v Sam Hinga Norman 'Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment)' (31 May 2004) SCSL 04-14-131, paras 10-24.

33 The Prosecutor v Sam Hinga Norman 'Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment)' (31 May 2004) SCSL 04-14-131, para. 51.

34 *Lubanga case* 'Judgment pursuant to Article 74 of the Statute' (14 March 2012) ICC-01/04 01/06-2842, para. 603.

35 *Lubanga case* 'Judgment pursuant to Article 74 of the Statute' (14 March 2012) ICC-01/04 01/06-2842, para. 604.

perform in the efforts of war carried out by adults), in order to define the crime of child recruitment in a given case.

One important aspect of these two conducts is that they are independent of the "use" of children. Thus, the simple recruitment of children, either by force (conscription) or voluntarily (enlistment) encompasses a war crime, regardless of whether children were recruited for active use in hostilities or for other purposes such as domestic labour or sexual slavery.[36]

The Trial Chamber in the *Lubanga case* concluded in fact that conscription, enlistment and use are three alternative and separate offences. Thus, the Chamber determined that a child might be enlisted or conscripted, independently of whether she or he is later used to participate in hostilities. This is particularly significant, because the Chamber rejected the defence's submission that enlistment and conscription had to be done for the purpose of using the child to participate actively in hostilities.[37] This interpretation permits the inclusion within the concepts of "enlistment" and "conscription" the plight of girls who are often abducted by armed groups to act as sexual slaves, cooks or domestic workers. This is also a helpful interpretation which in a sense presumes that any child who joins an armed group, either by force or voluntarily, to serve in the military efforts or to act as domestic servant or sex slave, is equally put at risk by losing his or her protection as a civilian and thus becoming a military target.

The element that differentiates "conscription" from an "enlistment" is how recruitment occurs, either with the consent of the child (enlistment) or by force (conscription). Three interpretations are possible regarding consent, that offer three diverse levels of protection for children: a) consent of the child is a valid defence; b) consent of the child is not a valid defence but is legally relevant; and c) consent of a child under the age of 15 is legally irrelevant. It is important to study and analyse these three levels of protection in order to identify which interpretation is applicable to the Rome Statute, in accordance to the definition of enlistment, conscription and use provided for in Article 8 of the Rome Statute, but also in accordance with Article 21(3) of the Rome Statute that subjects the interpretation and application of the applicable law to internationally recognised human rights law.

In the *Lubanga case*, the Trial Chamber concluded that although "it will frequently be the case that girls and boys under the age of 15 will be unable to give genuine and informed consent when enlisting in an armed group or force", it still analysed whether the valid and informed consent of a child

36 Allison Smith, 'Child Recruitment and the Special Court for Sierra Leone' (2004) *Journal of International Criminal Justice*.

37 *Lubanga case* 'Judgment pursuant to Article 74 of the Statute' (14 March 2012) ICC-01/04 01/06-2842, para. 609.

under 15 years of age is a valid defence.[38] Thus, the Chamber accepted the possibility that some children below the age of 15 could give consent to enlist. As will be noted further below, it appears that the Majority of Trial Chamber I also accepted that consent is legally relevant as regards the sentence to be imposed to the convicted person.

a. Consent as a valid defence

One could declare that consent of a child to join an armed group is a valid defence, although as will be analysed below, under the Rome Statute this would be incompatible with its object and purpose and also irreconcilable with internationally recognised human rights. However, at least theoretically, the aspect of consent as a valid defence is still worthy of evaluation, particularly considering that recently there are commentators questioning whether child soldiers are all "vulnerable victims" that should be protected. Drumbl for example states that most child soldiers are neither abducted nor forcibly recruited, and at the time children exercise considerable initiative in joining an armed group. The author in fact states that the "international legal imagination" has predetermined that no child has the capacity to volunteer to consent to serve in an armed group.[39] In fact the author points out that just as Article 5 of the CRC recognises the "evolving capacities" of children, the term of "childhood" should not cover all underage fighters and a more refined appreciation of interstitial developmental categories would enhance the dexterity of international law in addressing young adults.[40] Although these affirmations may be the reality for some children joining armed groups (particularly adolescents), it is important to focus on the legal framework of the ICC, which prohibits, without exception, the recruitment of children, either voluntarily or compulsorily in armed groups or forces, in both international and non-international armed conflicts.

While the Rome Statute could be part of this "legal imagination", its provisions are clear and thus interpretations as those made by Drumbl, although applicable perhaps for purposes of reparations (that should not be seen to benefit victims of child recruitment vis-à-vis their communities), cannot be used to exclude children from participating as victims in ICC proceedings pursuant to Rule 85 of the RPE or to lead to impunity of these crimes enshrined in Article 8 of the Rome Statute as war crimes (*i.e.* this is also the case in the crime of statutory rape in many domestic jurisdictions, where there is a presumption of lack of consent due to the child's age). In accordance with Article

38 *Lubanga case* 'Judgment pursuant to Article 74 of the Statute' (14 March 2012) ICC-01/04 01/06-2842, paras 613-614.

39 Mark Drumbl, *Reimagining Child Soldiers in International Law and Policy* (Oxford University Press 2012) 13.

40 Mark Drumbl, *Reimagining Child Soldiers in International Law and Policy* (Oxford University Press 2012) 48-49.

31 of the Vienna Convention on the Law of the Treaties from 1969, a treaty shall be interpreted "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and *in the light of its object and purpose*" (emphasis added). Given that the Rome Statute declares in its Preamble that it is "determined to end impunity for perpetrators", an interpretation of this sort would be against the object and purpose of the Rome Statute, which criminalised the conduct of enlistment, conscription and use of children under the age of 15 to participate actively in the hostilities.

b. Consent is not a valid defence but is legally relevant

Article 8 of the Rome Statute can also be interpreted as providing a certain level of protection, recognising that consent of a child to enlist is possible, although it is not considered a valid defence that would justify the criminal conduct on behalf of the perpetrator. This in fact appears logical since the Rome Statute clearly differentiates three conducts: a) enlistment – which includes voluntary recruitment, b) conscription – which includes recruitment by force, and c) use of children to participate (either by force or voluntarily). It can thus be argued that Article 8 of the Rome Statute foresees that children may consent to join an armed group and/or to participate in hostilities.

The Pre-Trial Chamber in the *Lubanga case* interpreted Article 8 as such and concluded that a child's consent is not a valid defence.[41] Trial Chamber I in the conviction of Mr Lubanga adopted this same interpretation as regards the "defence". Moreover, the Trial Chamber in the *Lubanga case* concluded that crimes of conscription and enlistment are continuous in nature and thus only end when the child reaches 15 years of age or when he or she leaves the armed group or force.[42]

In the *Lubanga case*, the majority of the Trial Chamber appears to have accepted that consent of children under the age of 15 is possible and is legally relevant, at least in relation to the sentence to be imposed to the convicted person. In that case, the majority of the Trial Chamber concluded that the crime of conscription, which has an "added element of compulsion", warranted 13 years of imprisonment, while enlistment warranted 12 years of imprisonment.[43] Judge Odio Benito, in her dissenting opinion, concluded that crimes of enlistment, conscription and use, although distinct crimes pursuant to the Rome Statute, result in damage to the victims and their families, "regardless of the nature of their initial recruitment" (voluntary or compulsory). She also stated that all three crimes (enlistment, conscription and use) "put young

41 *Lubanga case* 'Decision on the confirmation of charges' (14 May 2007) ICC-01/04-01/06-803-tEN, para. 247.

42 *Lubanga case* 'Judgment pursuant to Article 74 of the Statute' (14 March 2012) ICC-01/04 01/06-2842, paras 616-618.

43 *Lubanga case* 'Decision on Sentence pursuant to Article 76 of the Rome Statute' (10 July 2012) ICC-01/04-01/06-2901, paras 37 and 98.

children under the age of 15 at risk of severe physical and emotional harm and death", and therefore she concluded that the sentence to be imposed to the convicted person for all three crimes was to be the same and not differentiated, as the majority decided.[44] Indeed, Judge Odio Benito's dissent focuses not on the origin of the crime (with or without consent), but emphasises on the result (harms suffered by the victims) which expectedly would be the same, regardless of whether the child originally "consented" to the commission of the crime.

A similar interpretation has been applied by the SCSL, which has accepted that children do have voluntariness, although rejecting it as a possible defence for the accused.[45] For example, the Trial Chamber in the *RUF case* at the SCSL made an interesting interpretation of "conscription", which defined two manners in which this conduct may take place. It stated that this practice to compel a child to join an armed group may be done a) by "legal" means (*i.e.* by State law); or b) illegally (through use of force or by abduction).[46] The first manner, the "legal" way, gives leeway to an interpretation by ICC judges that could include other "legal" manners of conscription, (such as propaganda or pressure to parents) that could have an impact on the child's "consent" to join the armed group.

However, not all the criteria adopted by the SCSL are applicable to the ICC's legal framework and thus should be used with caution, because it could either have a more restrictive or broader approach than the Rome Statute and its Elements of Crimes. For example, in the *AFRC case*, the SCSL Trial Chamber defined conscription as encompassing acts of coercion by an armed group against children, committed for the purpose of using them to participate actively in hostilities.[47] This concept seems to add an extra element to the crime, which is not included in the elements of crimes, that is the "purpose" of using children to participate in hostilities. This interpretation, however, is clearly contrary to the criteria applied by Trial Chamber I in the *Lubanga case* already analysed above. Another example can be found in the *RUF Case*, in which the Trial Chamber noted that since many of the children abducted were subsequently forcibly trained, it would be impermissible for the Chamber to treat these practices as separate bases for findings of conscription.[48] This interpretation by the SCSL, which could have been applicable to the case at hand, may not be applicable to cases before the ICC, where children could very well be conscripted within an armed group and not necessarily receive military training (*i.e.* if they are to be used for other purposes, such as being

44 *Lubanga case* 'Decision on Sentence pursuant to Article 76 of the Rome Statute' (10 July 2012) ICC-01/04-01/06-2901, para. 51.
45 *AFRC case* 'Sentencing Judgment' (19 June 2007) SCSL 04-16-624, para. 735.
46 *RUF case 'Judgment'* (2 March 2009) SCSL04-15-1234, para. 186.
47 *AFRC case* 'Sentencing Judgment' (19 June 2007) SCSL 04-16-624, para. 734.
48 *RUF case* 'Judgment' (2 March 2009) SCSL 04-15-1234, para. 1695.

messengers, porters or sexual slaves). This concept of conscription, which links it to military training would very often leave many children associated with armed groups unprotected and therefore should not be adopted as a "general principle" but applied on a case-by-case basis.

Likewise, regarding the concept of "enlistment", the SCSL Appeals Chamber established that enlistment in the broad sense includes any conduct in which a child is accepted as part of the militia, thus coming in fact close to a crime by omission (of not stopping the child from joining the armed group). In the view of the Appeals Chamber of the SCSL, by simply not stopping or not preventing a child from joining an armed group the crime of "voluntary enlistment" is committed.[49] This however, could be complicated to apply in the ICC framework, because Article 25 of the Rome Statute does not foresee criminal responsibility by omission.

It can thus be concluded that although a child's consent is not a valid defence, the Rome Statute appears to accept that children can legally "consent" to either join an armed group or to participate actively in the hostilities. However, additional elements such as the purpose of the enlistment or conscription, which are not required by the ICC provisions, should be disregarded as they may lead to impunity against these crimes and may leave many children unprotected, particularly those who are recruited by armed groups but not clearly to fulfil a military purpose within the group.

Notwithstanding the fact that the ICC case law so far has accepted that consent may be possible, although not a valid defence, the following subsection will analyse one more interpretation, which disregards consent of children under the age of 15 to form part of an armed group and/or to participate in hostilities and consequently makes it legally irrelevant (including for sentencing and reparations purposes).

c. Consent is impossible and legally irrelevant

The highest level of protection for children is the interpretation that children under the age of 15 cannot legally give consent to join an armed group.[50] As mentioned before, this interpretation seems to go one step beyond the level of protection provided for in Article 8 of the Rome Statute, which foresees the crime of "enlistment" and thus the voluntary recruitment of children (involving some kind of consent). One could thus argue that although consent is practically impossible, it is legally foreseen under ICC standards.

However, if the crime of enlistment, conscription and use is considered on a case-by-case basis, taking into consideration the environment of violence in which child victims could be immersed, one could conclude that consent

49 *CDF case 'Judgment'* (28 May 2008) SCSL-04-14-829, para. 144.

50 Nienke Grossman, 'Rehabilitation or Revenge: Prosecuting Child Soldiers for Human Rights Violations' in Sara Dillon (ed), *International Children's Rights* (Carolina Academic Press 2010) 727.

is not legally possible, as children under 15, even if they appear to consent, do not necessarily fully understand the negative consequences of their enlistment (*i.e.* danger to their lives, punishments, sexual violence, etc.) or do not have the possibility to do so freely (*i.e.* hunger, domestic violence, civilian insecurity, etc.).[51] One could also argue that although there is consent at the beginning of the crime (when the child is enlisted), the child will later not have the possibility to stop the crime (*i.e.* by leaving the armed group and enrolling in a school to study). Furthermore, as noted by Judge Odio Benito in her dissenting opinion referred to above, no matter how the crime of recruitment is initiated (by force or "voluntarily"), children indistinctly suffer harm as a result of their involvement with the armed group or force.

Accordingly, although consent of children under the age of fifteen is foreseen in the Rome Statute, it may be difficult to determine, because many of the "voluntary" child soldiers who decide to join the armed groups face some kind of physical, psychological or socio-economic circumstances that force them towards the armed group: violence, starvation, revenge for the killing or abuses committed against the child or his or her family, etc.[52] Likewise, though not strictly "compelling" children to enlist, some governments

51 For example Abbott states that children often join armed groups as a consequence of a culture of violence, desperation for food, the need for security or the drive to avenge the deaths of family members. The author also notes that children often "volunteer" to fulfil their basic needs or merely to survive. This commentator concludes that in a war-torn context, it is difficult to establish whether the child did indeed have freedom of choice in his or her decision to volunteer and may lack the capacity to determine his or her best interests, to independently form opinions or to analyse competing ideologies. Fujio also mentions that poverty, ethnic marginalisation, lack of education and spread of war and disease are some of the "root causes" of the use of children in armed conflict as children who enlist have not freely chosen this lifestyle; rather they were drawn into it by forces beyond their control. See: Amy B Abbott, 'Child Soldiers – The Use of Children as Instruments of War' (Summer 2000) *Suffolk Transnational Law Review*, 516-518; Christy Fujio, 'Invisible soldiers: how and why post-conflict processes ignore the needs of excombatant girls' (Fall 2008) *Journal of Law and Social Challenges*, 2 and 5.

52 See the Paris Principles: Principle 6.0 states that children become associated with armed forces or armed groups for numerous reasons. Many are forcibly recruited; others "volunteer" because of their circumstances. While war itself is a major determinant, children may view enlistment as their best option for survival for themselves, their families or communities in contexts of extreme poverty, violence, social inequality or injustice. Gender inequalities, discrimination and violence are frequently exacerbated in times of armed conflict. Girls and boys may be seeking to escape gender-based violence or other forms of discrimination. See also Principle 6.29, which states that girls' "voluntariness" may be the route to escape other crimes committed against them, such as sexual and gender-based violence and early marriage. See as regards girls: Plan UK, *Because I am a Girl, The State of the World's Girls, Special Focus: In the Shadow of War* (2008) 60-61, which observes that although both boys and girls are "pushed" by circumstances to join an armed group, girls are pushed by additional gender-specific factors, such as domestic physical and sexual violence.

or rebel armed groups use propaganda to convince children to join in hostilities, thus in a sense, predetermining their will to enlist and fight.[53]

In the context of the *Lubanga case*, a psychological expert witness called by the Trial Chamber declared that from a psychological point of view children cannot give informed consent to join an armed group due to the fact that they have none or limited access to information concerning the consequences of their choice and they neither control nor fully comprehend the structures and forces they are dealing with. She stated that children do not have full knowledge and understanding of the mind and ignore long-term consequences of their actions.[54]

From a legal point of view, the Special Representative of the UN Secretary General for Children and Armed Conflict in her observations submitted to the Trial Chamber in the same case stated that '(a)ll "voluntary" acts or statements or other indications or interpretations of consent by children under the legal age for recruitment are legally irrelevant'.[55] She stated that consent is not a defence since it is absolutely agreed universally that children under 15 years cannot reasonably give consent to their own abuse and exploitation and any line between voluntary and forced recruitment is not only legally irrelevant but also practically superficial in the context of children in armed conflict.[56]

However, one could argue that Article 8 of the Rome Statute clearly includes the crime of "enlistment" and foresees voluntary recruitment and this is legally relevant under ICC standards, which clearly differentiates between "conscription" and "enlistment". Nevertheless, prosecution policy in the future could shift and bring charges against the accused only for the conduct of conscription and use, thus leaving out the conduct of enlistment and eventually making it obsolete. Likewise, in cases such as the current ones before the ICC, in which the crime of enlistment is charged, victims participating in the case could bring the factors that lead to their recruitment to the attention of the Chamber. This could give the Chamber the basis to refer to lack of consent of victims (*i.e.* extreme hunger, violence, loss of parents, displacement, etc.) and thus re-characterise the charges so as to only include conscription and

53 Amy B Abbott, 'Child Soldiers – The Use of Children as Instruments of War' (Summer 2000) *Suffolk Transnational Law Review*, 516.

54 *Lubanga case,* Transcript of hearing (7 of April 2009) ICC-01/04 01/06-T-166-ENG, 13 and 90; Elisabeth Schauer, *The Psychological Impact of Child Soldiering* (Report of Ms. Elisabeth Schauer following the 6 February 2009 "Instructions to the Court's expert on child soldiers and trauma" ICC-01/04-01/06-1729-Anx1, 25 of February 2009) 7-8.

55 *Lubanga Case* 'Annex A of Submission of the Observations of the Special Representative of the Secretary General of the United Nations for Children and Armed Conflict pursuant to Rule 103 of the Rules of Procedure and Evidence' (18 March 2008) ICC-01/04-01/06-1229-AnxA para. 10.

56 Lubanga Case 'Annex A of Submission of the Observations of the Special Representative of the Secretary General of the United Nations for Children and Armed Conflict pursuant to Rule 103 of the Rules of Procedure and Evidence' (18 March 2008) ICC-01/04 01/06-1229-AnxA, para. 14.

use. Another option would be, not to drop the charges of enlistment, but make a determination in the sense that although enlistment occurs when the child seems to accept his or her recruitment (in the origins of the commission of the crime), this consent is only temporary (and apparent), as the crime is continuous in nature and children under the age of 15 in armed conflict situations could not possibly consent to the harms suffered as a consequence of these crimes.

The bottom line is that although the reality in the field is that many children "consent" to enlist in order to have food or obtain what in their view is safety, this should not be legally relevant, particularly considering that the ICC sets international standards that are often followed by other international and national jurisdictions. The ICC will need to acknowledge that regardless of how the recruitment of a child is initiated (with or without consent, either real or apparent, with or without physical force or other means of coercion) harm suffered by the child will be equally serious and devastating for his or her childhood and his or her future life as an adult.[57] As mentioned by the Special Representative of the Secretary General of the UN for Children and Armed Conflict, there is no "best interests of the child defence" and recruitment *per se* is against the best interests of the child.[58]

Therefore, any difference between "conscription" and "enlistment", namely "voluntariness", should be made only to satisfy legal requirements under Article 8 of the Rome Statute (*i.e.* indictment against the accused), but should certainly not serve as a legal basis to justify the perpetrator's conduct, or to diminish his or her sentence, or to diminish the victim's rights for reparation. Likewise, as has been the experience in the *Lubanga case*, Chambers should adopt the practice of calling expert witnesses that will describe to the Chamber the realities of the armed conflict context and the forces that drive children

57 For example, as expert witness Elisabeth Schauer stated in the Lubanga case before the ICC, the effect of cumulative exposure to violence makes ex combatants a highly vulnerable group as they are exposed to a high number and outstanding diversity of traumatic stressors that can even go beyond the child's generation and pass on to future generations (his or her eventual children), Elisabeth Schauer, The Psychological Impact of Child Soldiering, ICC-01/04-01/06-1729-Anx1 (25 of February 2009) 15 and 25. This is also shared by Abbott, who considers that children's participation in warfare "violates their innocence, exploits their particular vulnerability and destroys their future and, therefore, the future of their society". Amy B Abbott, 'Child Soldiers – The Use of Children as Instruments of War' (Summer 2000) *Suffolk Transnational Law Review*, 518.

58 *Lubanga Case* 'Annex A of Submission of the Observations of the Special Representative of the Secretary General of the United Nations for Children and Armed Conflict pursuant to Rule 103 of the Rules of Procedure and Evidence' (18 March 2008) ICC-01/04 01/06-1229-AnxA, para. 11.

to join armed groups and adults (often including their own parents) to recruit them.[59]

4.3.2.3 *The concept of use of children under the age of 15 to participate actively in hostilities*

Regarding the concept of "use" there are three main criteria that offer three distinct levels of protection for children that in one way or another are associated with armed groups or armed forces. The first one, the most limited, requires that children take *direct* part in hostilities. The second criterion requires that children take *active* part in hostilities, although not necessarily direct, thereby excluding children used by armed groups for domestic or sexual purposes. A third criterion, the one that provides most protection for children, includes within the concept of "use" all children that are associated with armed groups and therefore seen as a military target by warring factions. The following subsection will examine these three criteria and also examine the interpretation of "use" adopted by Trial Chamber I in the *Lubanga case*'s verdict.

a. Use as "direct participation"

The prohibition to use children in hostilities was first codified in the Additional Protocols of 1977, and was differently formulated, depending on whether the armed conflict was international or non-international.[60] Article 77(2) of Additional Protocol I refers to "measures so children who have not attained the age of fifteen years do not take a *direct* part in hostilities", and thus applies the most restrictive criteria. Additional Protocol I thus prohibits the use of children for functions of a combatant, as defined by international humanitarian law, and therefore leaves unprotected children involved in other indirect activities, such as those that work as messengers, transporting ammunition, etc. This narrow concept was also adopted by the ICTR Trial Chamber in the *Akayesu* judgment, which found that "to participate actively in hostilities" is synonymous of taking "direct part in the hostilities" as used in Additional Protocol I.[61]

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59 Judges could call not only children's rights experts, but particularly experts in other fields that are not necessarily legal, for example, psychologists, sociologists, military experts, etc. In the *Lubanga case* there were two experts called. One is a clinical psychologist with specialisation in post-traumatic stress disorder who has worked extensively with demobilised children, particularly in Africa. The other expert is the UN Special Representative on Children and Armed Conflict, who as part of her work visits different areas of the world in which there is armed conflict and investigates on the situation of children therein. The *curriculum vitae* of Ms. Radhika Coomaraswamy is provided for in: *Lubanga case* 'Annex A: Submission by the Registrar of the Curriculum Vitae of Chamber expert Mrs Radhika Coomaraswamy' (3 June 2010) ICC-01/04-01/06-2464-AnxA.

60 Allison Smith, 'Child Recruitment and the Special Court for Sierra Leone' (2004) *Journal of International Criminal Justice*, 1145.

61 ICTR, *Akayesu case*, 'Judgement' (2 September 2008) Case No ICTR-96-4-T, para. 629.

Article 38 of the CRC, which refers to child combatants, also applies the standard of "direct part in hostilities" and thus paradoxically offers the lowest level of protection for children who are involved in armed conflict. In fact, given the quasi universality of the CRC, one could argue that this is an internationally recognised (low) standard which is again repeated in the Optional Protocol to the CRC, in which, although the standard is raised to 18 years of age, still refers to children taking "direct part in hostilities".

However, this low standard of CRC can be overcome by using Article 41 of the same Convention, which states that nothing in it (and its Protocols) shall affect any provisions that are more conducive to the realization of the rights of the child. In a sense, Article 41 of the CRC acknowledges that higher standards of protection of children may exist at national or international level, and thus these should prevail over the CRC. Consequently, higher levels of protection contained in other legal provisions in the following subsections b) and c) should be applied, as they provide more protection to children in armed conflict.

b. Use as direct and indirect participation but excluding use for other purposes (namely domestic work and sexual violence)

Article 4(3)(c) of Additional Protocol II states that "children who have not attained the age of fifteen years shall neither be recruited in the armed forces or groups nor allowed to *take part in hostilities*", and thus protects children from direct and indirect participation in hostilities. In fact, the International Committee of the Red Cross Commentary to Protocol I concludes that since the intention of the drafters was to keep children under fifteen outside of armed conflict, the lower criteria in Protocol I should be interpreted as including both direct and indirect participation in hostilities in light of the higher standard contained in Protocol II.[62]

The Rome Statute seems to apply this higher standard, as it uses the term "actively participate in hostilities", and thus appears to include both direct and indirect participation insofar as it is "active". However, the question then arises as to what is "active participation".

The case law of the SCSL sheds some light on the notion of "active participation", as well as some preparatory documents to the Rome Statute, which could identify the drafters' intention in this regard. In the SCSL, the Trial Chamber in the *AFRC case* opted for a definition of the concept of active participation that encompasses any conduct that places the lives of children directly at risk and thus did not limit the term solely to "participation in combat". The Chamber stated that any labour or support that gives effect to, or helps maintain, operations in a conflict constitutes active participation. In the *AFRC case*, in the Chamber's view, carrying loads for the fighting action,

62 Allison Smith, 'Child Recruitment and the Special Court for Sierra Leone' (2004) *Journal of International Criminal Justice*, 1145.

finding or acquiring food, ammunition or equipment, acting as a decoy, messenger, making trails or finding routes, working at checkpoints or acting as a human shield, are all some of the examples of active participation.[63] In fact, if one reads the criteria applied by the Trial Chamber in the *AFRC case*, most children associated with armed groups, including girls who are forcibly abducted for sexual purposes, also fulfil one or more of the above tasks (*i.e.* acquiring food) and could be included in this broad term of children "used to actively participate in hostilities".

The Trial Chamber in the *RUF case* adopted a concept of "active participation" that clearly departs from a focus on the "tasks" performed by the children, and instead concentrates on the fact that children lose their civilian status and thus become a military target.[64] However, in spite of the above criteria, the same Trial Chamber unfortunately determined that abducted girls of less than 15 years of age, who had been forced into sexual partnership with fighters and used to perform domestic chores for commanders, did not *per se* participate actively in hostilities, as these activities were not related to the hostilities and did not directly support the military operations of the armed groups.[65] Thus, it appears that the Trial Chamber in the *RUF Case* contradicted its own criteria, as clearly girls used for sexual and domestic purposes by armed groups will lose their civilian status vis-à-vis the enemy, regardless of whether their activities are related to military operations.

The Zutphen Draft of the Rome Statute has also been referred to by ICC Chambers, as it may be considered as a document that reflects the drafters' intention as to the meaning of the words 'using' and 'participate'. The Zutphen Draft states in its footnotes that these cover both direct participation in combat and active participation in military activities linked to combat such as scouting, spying, sabotage and the use of children as decoys, couriers or at military checkpoints. The draft excludes activities which are described as clearly unrelated to hostilities, such as food deliveries to an airbase or the use of domestic staff in an officer's married accommodation.[66] It is clear that the Zutphen Draft, as the SCSL case law above, did not include many of the tasks

63 *AFRC case* 'Sentencing Judgment' (19 June 2007) SCSL 04-16-624, paras 736-737.

64 The Chamber is mindful that an overly expansive definition of active participation in hostilities would be appropriate as its consequence would be that children associated with armed groups lose their protected status as *hors de combat* under the law of armed conflict. (…) The Chamber considers this interpretation necessary to ensure that children are protected from any engagement in violent functions of the armed conflict that directly support its conflict against the adversary and in which the child combatant would be a legitimate military target for the opposing armed group or groups. See: *RUF case* 'Judgment' (2 March 2009) SCSL 04-15-1234, para. 1723.

65 *RUF case* 'Judgment' (2 March 2009) SCSL 04-15-1234, paras 1622 and 1730. See also *Taylor case* 'Judgment' (18 May 2012) SCSL-03-01-1281, para. 1411.

66 PrepCom, *Report of the Inter-sessional Meeting from 19 to 30 January 1998 in Zutphen, The Netherlands* (4 February 1998) A/AC.249/1998/L.13, Article 20(E), at 23 n. 12.

usually performed by girls (although not exclusively), such as domestic work and sexual slavery, within the concept of "use".

Pre-Trial Chamber I of the ICC defined the concept "participate actively" following the Zutphen Draft and thus excluding conducts such as the delivery of food and the domestic help in an officer's married accommodation, as these activities were considered to have no connection to the hostilities. However, the Chamber included conducts such as guarding military objects and acting as a bodyguard within the concept, thus expanding the notion slightly further.[67] The Pre-Trial Chamber also determined that in order for these activities to be related to hostilities the following two requirements are necessary: a) the military commanders are in a position to take all necessary decisions regarding the conduct of hostilities; and b) they have a direct impact on the level of logistic resources and on the organisation of operations required by the other party to the conflict whose aim is to attack such military objectives.[68]

The criteria adopted by the SCSL and the ICC Pre-Trial Chamber (relying on the Zutphen Draft) thus adopted a higher standard, in order to include both direct and indirect participation. However, these criteria did not include other dimensions of child recruitment, namely the work performed by girls who are used for domestic and sexual purposes. In principle, the criteria adopted by the SCSL and the ICC Pre-Trial Chamber focuses on the nature of the tasks and the link between these tasks and the military objectives of the armed group or force. As will be noted below, a criterion that focuses on the risk and the fact that children lose their civilian status, offers greater protection to these children.

c. Use as "associated with an armed group"

Although one could argue that the Rome Statute does not include within the concept of "use" the plight of children serving as domestic servants or sexual slaves (as the aforesaid criteria of the Pre-Trial Chamber), it is also possible to interpret and apply the law in order to adopt a more comprehensive definition that encompasses other activities connected with hostilities and that are part of today's armed conflicts.

A broader notion of "use" should not only focus on the tasks performed by children within the armed group, but also on how other warring factions in armed conflict see that child who is associated with the armed group. Therefore, focus should not only be given to the internal tasks children perform within the armed group, but also on external considerations, namely that the child will be perceived as a combatant, regardless of the nature of the task he or she performs within the armed group. In summary, all children asso-

67 *Lubanga case* 'Decision on the confirmation of charges' (14 May 2007) ICC-01/04 01/06-803-tEN, para. 267.

68 *Lubanga case* 'Decision on the confirmation of charges' (14 May 2007) ICC-01/04 01/06-803-tEN, para. 263.

ciated with armed groups are seen as military targets by outsiders and thus are equally unprotected and vulnerable. In fact, one could even argue that children who are used for "non-military" purposes such as domestic or sexual servants, are even more vulnerable as they are not necessarily armed. Likewise, as noted by Fujio, girls suffering goes beyond their recruitment, as they often face new obstacles and prejudices as they attempt to reintegrate into society, having been exposed to sexual violence and its accompanying "twin dangers": unwanted pregnancies and sexually transmitted diseases.[69] The author also states that children who are associated with an armed group and witness atrocities can be equally harmed as those being forced to take part in combat and commit atrocities.[70] Clearly, a definition of child recruitment that ignores this reality seems incomplete, as it ignores the gender-specific harms suffered by children as a result of the crime of child recruitment. A broader concept would thus satisfy the main object of the prohibition of child recruitment, which is to keep children safe from violence, abuse and exploitation, taking into account risks for their physical and psychological well-being resulting from such involvement with an armed group, regardless of whether this involvement occurred in the battlefield or in the armed group's kitchen or sleeping quarters.

If one considers that the criminalisation of child recruitment aims to limit the exposure of children to violent acts, any child associated with an armed group could thus be seen as a combatant by the enemy, and lose *de facto* the protective status of civilian and become a legitimate military target under the Geneva Conventions and their Additional Protocols, regardless of whether that child is a boy soldier or a girl "married" to a commander.

In fact, the Special Representative of the Secretary General for Children and Armed Conflict, who testified as an expert in the ICC *Lubanga case,* rejected any definition that excludes a great number of children in current armed conflicts that are some way or another associated with armed groups.[71] The Special Representative suggested that the ICC should adopt a case-by-case approach, in which children's participation is analysed on the basis of whether it served a support function to the armed force or group during the period of conflict. The Special Representative identified within such roles, activities

69 Christy Fujio, 'Invisible soldiers: how and why post-conflict processes ignore the needs of ex-combatant girls' (Fall 2008) *Journal of Law and Social Challenges*, 10.

70 Christy Fujio, 'Invisible soldiers: how and why post-conflict processes ignore the needs of ex-combatant girls' (Fall 2008) *Journal of Law and Social Challenges*, 6. The State of the World's Girls has observed that in fact, conscription of girls is often accompanied by rape and sexual violence and most (if not all) girls who have been associated with armed groups have been raped. See: Plan UK, *Because I am a Girl, The State of the World's Girls, Special Focus: In the Shadow of War* (2008) 65.

71 *Lubanga Case* 'Annex A of Submission of the Observations of the Special Representative of the Secretary General of the United Nations for Children and Armed Conflict pursuant to Rule 103 of the Rules of Procedure and Evidence' (18 March 2008) ICC-01/04 01/06-1229-AnxA, para. 20.

such as acting as cooks, porters, nurses, spies, messengers, administrators, translators, radio operators, medical assistants, public information workers, youth camp leaders, and girls or boys used for sexual purposes.[72]

However, the ICC needs a legal basis to justify such a broad concept, particularly in light of Article 22 of the Rome Statute, containing the principle of legality. A plain reading of Article 8 of the Rome Statute does not limit the concept of "use", as adopted by the Pre-Trial Chamber. However, the Zutphen Draft clearly reflects drafters' rejection to include this broader concept. Although the Zutphen Draft is not applicable law *per se*, it does provide some guidance as to the intention of the drafters of the Rome Statute. However, the changing nature of armed conflicts and the Rome Statute's purpose and objective, which is to put and end to impunity to crimes committed against children, women and men (Preamble of the Rome Statute), should also be taken into consideration. In fact, the Zutphen Draft referred to activities carried out by children "in the frontline". The concept of "frontline" in current armed conflicts is a grey zone and one could consider that any child who is related to an armed group is within this frontline, whether the child is a girl who is "married" to a commander or is the bodyguard to a commander. They all suffer the same risks of physical and mental damage due to their relation with the armed group.

The ICC could rely on more than the Zutphen Draft for its interpretation of the concept of "use", for example using as guidance the Paris Principles, which refer to a broader concept of "children associated with armed forces or armed groups" including girls recruited for sexual purposes. In fact, looking closer at the criteria of the Pre-Trial Chamber, one could even argue that domestic and sexual activities carried out by children associated with armed groups are activities in which: a) commanders are in a position to take all necessary decisions regarding these activities; and b) these activities have a direct impact on the level of logistic resources and on the organisation of operations required by the other party to the conflict whose aim is to attack such military objectives.[73] To ignore the "support" given by child sexual slaves to military commanders in battle is to ignore the patriarchal aspect of armed

72 *Lubanga Case* 'Annex A of Submission of the Observations of the Special Representative of the Secretary General of the United Nations for Children and Armed Conflict pursuant to Rule 103 of the Rules of Procedure and Evidence' (18 March 2008) ICC-01/04 01/06-1229-AnxA, para. 23. The same multiple roles of girls associated with armed groups are identified by "The State of the World's Girls", which identified within reasons why armed groups recruit girls, not only to serve as fighters, but also to give sexual services and play different roles in the armed conflict. See: Plan UK, *Because I am a Girl, The State of the World's Girls, Special Focus: In the Shadow of War* (2008) 59.

73 *Lubanga case* 'Decision on the confirmation of charges' (14 May 2007) ICC-01/04 01/06-803-tEN, para. 263.

conflict, which requires that men receive not only weapons, but also food and sexual pleasure before and after battle.[74]

d. "Use" according to the Trial Chamber in the Lubanga case

In the *Lubanga case*, the majority of the Trial Chamber, Judge Odio Benito dissenting, adopted an approach to "use" of children which is not based on the specific task carried out by the child, but on the risk to which the child is exposed, namely to the fact that the child becomes a target (and thus similar to the concept applied on section c) above).[75] The Trial Chamber adopted

74 Although in the *Lubanga case*, the victims' legal representatives failed in their attempt to include crimes of sexual violence within a case of child recruitment, some of the criteria applied by the judges in that case could actually be of use for future cases. In summary, the legal representatives of the victims filed a joint application pertaining to a procedure under Regulation 55 of the RoC, submitting that victims had suffered, additionally to their recruitment, inhumane and/or cruel treatment, and that young girls had been subjected to various acts of sexual violence and were reduced to sexual slavery, as a widespread and systematic practice, within the scope of the charges against the accused. The Trial Chamber, by majority, decided that the submissions of the legal representatives of victims and the evidence heard during the course of the trial had persuaded them that such a possibility (changing the legal characterisation of the facts) could exist. Accordingly, the parties and participants received notice that the legal characterisation of the charges could change in order to include sexual violence and inhumane treatment. The majority decision was however reversed in appeal since in the view of the Appeals Chamber, this interpretation of Regulation 55 would also result in a conflict with the Rome Statute because new facts and circumstances not described in the charges would be added to the case. See: *Lubanga case* 'Demand conjointe des représentants légaux des victimes aux fins de mise en œuvre de la procédure en vertu de la norme 55 du Règlement de la Court' (22 May 2009) ICC-01/04-01/06-1891 para. 11; *Lubanga case* 'Decision giving notice to the parties and participants that the legal characterization of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court' (14 July 2009) ICC-01/04-01/06-2049, para. 33; *Lubanga case* 'Judgment on the appeals of Mr Lubanga Dyilo and the Prosecutor against the "Decision of Trial chamber I of 14 July 2009 entitled "Decision giving notice to the parties and participants that the legal characterization of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court"' (8 December 2009) ICC-01/04-01/06-2205, para. 94. During a later status conference in the same case, a legal representative of the victims raised the issue again. The Trial Chamber issued a decision in which it stated that the factual allegations of the legal representatives supporting different crimes such as those involving inhumane and cruel treatment did not support the legal "elements of crimes" with which the accused was charged, and the factual allegations supporting sexual slavery had not been referred to at any stage in the decision on the Confirmation of the Charges and therefore did not support any element of the crimes constituting the charges confirmed against the accused." See: *Lubanga case* 'Decision on the Legal Representatives' Joint submissions concerning the Appeals Chamber's Decision on 8 December 2009 on Regulation 55 of the Regulations of the Court'(8 January 2010) ICC-01/04-01/06-2223 paras 33-36.

75 The concept of target should not be interpreted as "lawful target" of international humanitarian law, meaning that the child has lost his or her protection as a civilian. However, *de facto*, children may lose this protection. See Roman Graf 'The International Criminal Court and Child Soldiers, An Appraisal of the Lubanga Judgment' *Journal of International Criminal Justice* (2012) 963.

a criterion which allows for the inclusion of children "involved with the armed groups", regardless of whether their participation is directly or indirectly associated with hostilities. Thus, the Trial Chamber distanced itself from the Zutphen Draft and consequently the Pre-Trial Chamber's approach.[76] In the view of Trial Chamber I two factors need to be taken into consideration: a) the support provided by the child to the combatants; and b) the level of risk. As noted by Lieflander, the Trial Chamber thus defined the notion of "participation in hostilities" as "exposure to danger".[77] The Trial Chamber determined that "although absent from the immediate scene of the hostilities, the individual (child) was nonetheless actively involved in them". The Chamber finally concluded that given the "myriad of roles" carried out by children, the determination of whether a particular activity is to be considered as "active participation", can only be made on a case-by-case basis (as in fact had been recommended by Rhadika Coomaraswamy in that case).[78] Finally, regarding sexual violence, the Trial Chamber neither excluded nor included it as an activity within the concept of "use". This seems logical since it determined that this has to be done on a case-by-case basis. However it accepted that this may be taken into account for sentencing and reparations purposes.[79] It is to be noted however, that although the Trial Chamber did not make any finding as to the individual criminal responsibility of Mr Lubanga regarding sexual violence suffered by recruited children, it did refer in its Article 74 Judgment to the evidence that children, in particular girls, had been subject to sexual violence.[80]

Judge Odio Benito dissented with the majority of the Chamber. While the majority of the Chamber adopted a definition of "use" that is ultimately fact-dependent, as it needs to be determined on a case-by-case basis, Judge Odio Benito chose to adopt a legal concept that is independent of the evaluation of the evidence.[81] She thus concluded that the majority's decision not to include sexual violence within the legal concept of "use" could ultimately result in the invisibility of this intrinsic part of the involvement of children with an armed group.[82] Judge Odio Benito also disapproved of the concept of "target"

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76 *Lubanga case 'Judgment* pursuant to Article 74 of the Statute' (14 March 2012) ICC-01/04 01/06-2842, para. 628.

77 Thomas Lieflander, The Lubanga Judgment of the ICC, *Cambridge Journal of International and Comparative Law* (2012) 202.

78 *Lubanga case* 'Judgment pursuant to Article 74 of the Statute' (14 March 2012) ICC-01/04 01/06-2842.

79 *Lubanga case* 'Judgment pursuant to Article 74 of the Statute' (14 March 2012) ICC-01/04 01/06-2842, paras 630-631.

80 *Lubanga case* 'Judgment pursuant to Article 74 of the Statute' (14 March 2012) ICC-01/04 01/06-2842, paras 890-896.

81 *Lubanga case* 'Judgment pursuant to Article 74 of the Rome Statute' Separate and Dissenting opinion of Judge Odio Benito' (14 March 2012) ICC-01/04-01/06-2842, paras 5-7 and 15.

82 *Lubanga case* 'Judgment pursuant to Article 74 of the Rome Statute' Separate and Dissenting opinion of Judge Odio Benito' (14 March 2012) ICC-01/04-01/06-2842, para. 16.

adopted by the majority, because she considered that children who are used by armed groups often suffer harm by the same armed group that recruited them and not only from the "enemy" that sees them as a military target.[83]

The criteria adopted by both the majority of Trial Chamber I and Judge Odio Benito in her dissent, appear to grant greater protection to children associated with armed groups, as they focus not only on the tasks performed by children to define the concept of "use to actively participate in hostilities" pursuant to the Rome Statute. Although, as noted by Judge Odio Benito, the notion of "target" focuses on the outsider "enemy", very often, the "enemy" is within the same armed group, who rapes, tortures and subjects child recruits to inhumane and degrading treatment. Thus, a concept of "risk", either vis-à-vis enemies that consider the child as a combatant, but also vis-à-vis military commanders, is more comprehensive of the situation of children who are recruited by armed groups or forces. However, a too broad definition could be contrary to Article 22 of the Rome Statute, and thus, the case-by-case approach adopted by the majority of the Trial Chamber could be more favourable, as it would be bound by the "facts and circumstances" of the charges, and thus respectful of the principle of legality but also the right of the accused to have complete knowledge of his/her charges.

4.3.2.4 Age determination

A material element of the crime of child recruitment is that of the victim's age, which necessarily has to be below 15 at the time of the events. In this sense, the ICC's jurisdiction is limited and a crime under the Rome Statute will only occur insofar as the child being enlisted, conscripted or used is younger than 15 at the time of the events. This material element is also closely linked to the mental element, or *mens rea* of the crime, particularly in what refers to the knowledge and intention of the perpetrator of the crime of the child's age at the time of the commission.

In many countries, particularly those currently under scrutiny by the ICC, children have no documentation and birth registries are rare or inexistent in some areas. In the *Lubanga case*, for example, a former prosecution investigator testified that the DRC civil administration was limited and thus it was not easy to establish a child's age. The prosecution in the *Lubanga case* attempted to prove witnesses' ages based on their statements, civil status documents (where available) and forensic evidence (namely wrist and dental x-rays to establish physical development). However, in its judgment, the Trial Chamber found that the prosecution had failed to verify the children's age with their parents or communities and with existing civil registries in the DRC. Finally, the Trial

83 *Lubanga case* 'Judgment pursuant to Article 74 of the Rome Statute' Separate and Dissenting opinion of Judge Odio Benito' (14 March 2012) ICC-01/04-01/06-2842, paras 18-19.

Chamber concluded that forensic evidence was based on a model that was not meant to determine age, and particularly not of Sub-Saharan Africans.[84]

The Trial Chamber ultimately determined age relying on video footage in which children clearly under the age of 15 appeared either in training camps or being used as combatants,[85] the testimony of several witnesses and the comments that some witnesses made to video footage,[86] as well as documentary evidence.[87] These criteria, however, have the limitation of relying on a subjective appreciation of the physical appearance or manners in which a child acts, which, ultimately, could lead to mistakes. However, it can also be argued that if video footage and testimonies corroborate each other, along with the entire body of evidence in a trial, then this means of proof could be useful in a case where civil registries and birth certificates are inexistent.

In the SCSL, the Trial Chamber in the *Taylor case* considered several reports and expert evidence in order to determine age. It relied on an expert that submitted a report based on research into a database of some two thousand children who were abducted during the armed conflict when they were under the age of 15 between 1996-2002 (although interestingly the charges were from 1998 to 1999 only).[88] Most importantly, the Trial Chamber in the *Taylor case* recognised that although documentary evidence is more reliable evidence as to the age of a child, since this is not available in many parts of Sierra Leone, it had to rely on the testimony of witnesses who observed children under the age of 15. The Trial Chamber of the SCSL however acknowledged that these were estimations of age based on appearance, height, physical development and the witnesses' personal experience, rather than objective proof of age.[89] For example, the SCSL relied on the evidence of a former child soldier witness, who testified "he was very small" and "did not have facial hair at the time of his capture". Although the witness could not state when he was born, he testified that his father used to tell him he was 14 years old. The same witness presented a birth certificate and a national identification card that indeed appeared to be contradictory with regard to his exact age. Notwithstanding these inconsistencies, the Trial Chamber in the *Taylor case* concluded that he "was about 13" at the time of the events.[90]

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84 *Lubanga case* 'Judgment pursuant to Article 74 of the Statute' (14 March 2012) ICC-01/04 01/06-2842, paras 169-177.

85 *Lubanga case* 'Judgment pursuant to Article 74 of the Statute' (14 March 2012) ICC-01/04 01/06-2842, paras 779, 792-793.

86 *Lubanga case* 'Judgment pursuant to Article 74 of the Statute' (14 March 2012) ICC-01/04 01/06-2842, paras 255-257, 268, 644, 711-718 and 760-769.

87 *Lubanga case* 'Judgment pursuant to Article 74 of the Statute' (14 March 2012) ICC-01/04 01/06-2842, paras 741-748.

88 *Taylor case* 'Judgement' (18 May 2012) SCSL 03-01-1281, paras 1359-1360.

89 *Taylor case* 'Judgement' (18 May 2012) SCSL 03-01-1281, para. 1361.

90 *Taylor case* 'Judgement' (18 May 2012) SCSL 03-01-1281, paras 1383-1393.

The approach of the Trial Chamber in the *Taylor case* is without a doubt more flexible than the one adopted by the Trial Chamber in the *Lubanga case* (in which similar inconsistencies rendered child soldier witnesses unreliable). The downside of this more flexible approach adopted by the SCSL is that although it can lead to a conviction, it could also be contrary to the evidentiary threshold of "beyond reasonable doubt" required to convict an individual under the Rome Statute. Visibly, judges dealing with these crimes will need to be extremely cautious in order to achieve a balance between the need to fight impunity on the one hand, and the need to guarantee the rights of the accused person on the other.

However, lack of State civil registry infrastructure in Situation countries should not lead to impunity for international crimes. A high standard of knowledge and consent could lead to practically the impossibility to prosecute and convict someone for the crime of child recruitment. In fact, during the PrepComs there were two main views regarding the knowledge of the perpetrator of the victim's age.[91] Some States argued that no mental element was required, and if the victim was under 15, there would be criminal responsibility, even if the perpetrator ignored this. On the other hand, another group of delegations thought that, in strict application of Article 30(3) of the Rome Statute, full knowledge of the victim's age was required.[92] Finally a consensus was reached, and the Elements of Crimes establish that the "perpetrator knew or should have known" that the victim was under the age of 15.[93]

At a first glance it could appear that this element of the crime is contrary to the Rome Statute, and concretely to Article 30 of the Rome Statute that defines the mental elements of crimes under the jurisdiction of the ICC, requiring intent and knowledge. However, the "General Introduction" to the Elements of the Crimes provides in its paragraph 2 the following:

> 'As stated in Article 30, *unless otherwise provided*, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the ICC only if the material elements are committed with intent and knowledge. Where no reference is made in the Elements of Crimes to a mental element for any particular conduct, consequence or circumstance listed, it is understood that the relevant mental element, i.e., intent, knowledge or both, set out in Article 30 applies. *Exceptions to the Article 30 standard*, based on the Rome Statute, including applicable law under its relevant provisions, are indicated below.' (Emphasis added)

Herman von Hebel, who chaired the working group on the Elements of Crimes, believes that the above paragraph (adopted by two-thirds majority

91 Knut Dormann, *Elements of War Crimes Under the Rome Statute of the ICC* (International Committee of the Red Cross, 2003) 375.

92 Article 30(3) of the Rome Statute states that "knowledge" means awareness that a circumstance exists or a consequence will occur in the ordinary course of events.

93 William Schabas, *Unimaginable Atrocities* (Oxford University Press 2012) 126.

of State Parties to the Rome Statute in September 2002, while celebrating its first-ever ASP), reflects the consensus of the international community to lower the standard of Article 30 of the Rome Statute so as to make viable the prosecution of crimes of child recruitment.[94] The author also states that while the elements are not binding *per se*, they have persuasive force as they reflect the consensus view of the international community.[95]

One could also apply Article 21(3) of the Rome Statute, which requires that the law under the Rome Statute shall be interpreted and applied in accordance with internationally recognised human rights. Considering that a strict interpretation under Article 30 of the Rome Statute could leave most (if not all) crimes of child recruitment unpunished, the interpretation that the "*lex specialis*" of the Elements of Crimes applies over the "*lex generalis*" of Article 30 would grant a greater scope of protection to the victims of this crime. Finally, in accordance with Article 31 of the Vienna Convention on the Law of the Treaties from 1969, a treaty shall be interpreted "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and *in the light of its object and purpose*" (emphasis added). Given that the Rome Statute declares in its Preamble that it is "determined to end impunity for the perpetrators", a strict application of the *mens rea* requirements of Article 30 of the Rome Statute would defeat the object and purpose of this international treaty, leaving virtually all crimes of child recruitment unpunished.

Although this could have been an issue to be dealt with by the Trial Chamber in the *Lubanga case*, the Chamber concluded that since the prosecution had not invited a conviction based on this lesser mental element of "should have known", the Chamber based its findings on the "knew" mental element of Article 30 of the Rome Statute.[96]

Albeit the reluctance of the Trial Chamber in the *Lubanga case* to make a determination as to this mental element of "should have known", Chambers in future cases could adopt an approach in which Article 30(3) of the Rome Statute does not apply for the crimes of enlistment, conscription and use of children and therefore what applies are the specific elements of this crime, which require that the perpetrator either knew the age of the child, or else he or she consciously took no notice on the child's age, even if it were possible that the child was under fifteen (*i.e.* due to the child's physical appearance). Consequently, the perpetrator could be criminally responsible if he or she acted

94 Roy S Lee (ed), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (Transnational Publishers, 2001).

95 Roy S Lee (ed), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (Transnational Publishers, 2001). .

96 Regrettably, the Chamber simply noted that this lesser mental element raises a number of issues. See: *Lubanga case 'Judgment* pursuant to Article 74 of the Statute' (14 March 2012) ICC-01/04 01/06-2842, para 1015.

recklessly, not taking the necessary measures to assure him or herself of the child's age.

4.4 International crimes in which children are disproportionately or more seriously affected

4.4.1 Sexual violence

Article 7 of the Rome Statute prohibits the following acts of sexual violence as crimes against humanity:

> 'Article 7 Crimes against humanity
> 1. For the purpose of this Statute, "crime against humanity" means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:
> (…)
> (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;
> (…)
> 2. For the purpose of paragraph 1:
> (…)
> (c) "Enslavement" means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children;
> (…)
> (f) "Forced pregnancy" means the unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law. This definition shall not in any way be interpreted as affecting national laws relating to pregnancy;
> (…)
> 3. For the purpose of this Statute, it is understood that the term "gender" refers to the two sexes, male and female, within the context of society. The term "gender" does not indicate any meaning different from the above.'

Article 8 of the Rome Statute prohibits the following acts of sexual violence as war crimes:

> '(…) 2. For the purpose of this Statute, "war crimes" means:
> (…) (b) Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts: (…)
> (xxii) Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in Article 7, paragraph 2 (f), enforced sterilization, or any other form of sexual violence also constituting a grave breach of the Geneva Conventions;

> (…) (e) Other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law, namely, any of the following acts: (…)
> (vi) Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in Article 7, paragraph 2 (f), enforced sterilization, and any other form of sexual violence also constituting a serious violation of Article 3 common to the four Geneva Conventions.'

Although the criminal conduct identified in Articles 7 and 8 of the Rome Statute refer specifically to crimes against humanity and war crimes, they could also be useful in the interpretation of acts of sexual violence as genocide under Article 6(b) of the Rome Statute, as "causing serious bodily or mental harm to members of the group". This in fact is stipulated in the Elements of Crimes of Article 6(b), which in footnote 3 state that this conduct may include, but is not necessarily restricted to, acts of torture, rape, sexual violence or inhumane or degrading treatment. Likewise, acts of sexual violence could be equally considered torture or inhumane or degrading treatment, for example when family members are forced to watch their relatives getting raped.[97]

It is also important to consider the previous analysis on the crime of conscription, enlistment and use of children, and the fact that sexual violence is very often an intrinsic element of the crime of child recruitment. Very often girls and boys who are recruited by armed groups suffer from sexual violence. Thus, crimes of sexual violence could also be brought as separate charges against perpetrators of crimes of child recruitment. As pointed out by Judge Odio Benito in her dissenting opinion in the *Lubanga case* judgment, although sexual violence is an intrinsic element of the concept of "use of children under the age of 15 to participate in the hostilities", crimes of sexual violence are also distinct and separate crimes that could be evaluated separately if they are presented as separate charges by the Prosecutor.[98]

For the purpose of this research, each criminal conduct that is common to the crimes of sexual violence under crimes against humanity and war crimes will be individually yet succinctly described. Although this research will focus on the Elements of Crimes, it is vital to acknowledge that landmark judgments of the ad-hoc tribunals could be useful for the interpretation of the concepts of sexual violence included in the Rome Statute.[99] After all, the crimes included in the Rome Statute are the result of the case law developed by the

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97 See for example *Bemba case* 'Amicus curiae observations of the Women's Initiative for Gender Justice pursuant to Rule 103 of the RPE' (31 July 2009) ICC-01/05 01/08-466.

98 *Lubanga case* 'Judgment pursuant to Article 74 of the Rome Statute' Separate and Dissenting opinion of Judge Odio Benito' (14 March 2012) ICC-01/04-01/06-2842, para. 20.

99 See for example: ICTY, The Prosecutor v Zdravko Mucic et al, 'Judgment' (16 November 1998) Case No IT 96-21-T; ICTR, *Akayesu case,* 'Judgement' (2 September 2008) Case No ICTR-96-4-T; ICTY, The Prosecutor v Anto Furundžija 'Judgment' (10 December 1998) Case No IT 95-17/1-A; The Prosecutor v Milorad Krnojelac 'Judgment' (15 March 2002) Case No IT 97-25-T.

ad-hoc tribunals. Finally, this Chapter will refer to the developing ICC case law, since there are several cases involving sexual violence before the ICC.[100] However, a conviction for these crimes is yet to be seen.

4.4.1.1 The underlying acts of sexual violence

A fundamental element in crimes of sexual violence is the use of force or lack of consent, which includes not only physical force, but also threat of force or coercion.[101] The Elements of Crimes include a broad range of forceful

100 Four cases are pending in the trial and appeal stage. *The Katanga case and Ngudjolo case,* which involves crimes of rape and sexual violence as war crimes and crimes against humanity, among other charges, is in its final phase, with Mr Ngudjolo having been acquitted and released (final appeal is pending), while Mr Katanga is awaiting the Chamber's judgement under Article 74 of the Rome Statute. The *Bemba case,* which involves crimes of rape as crimes against humanity and war crimes, is in the presentation of the defence case. Moreover, in the Kenya Situation, the Pre-Trial Chamber confirmed charges of rape and declined to confirm charges of "other forms of sexual violence" in the *Kenyatta case.* The trial in this case is yet to commence. In other cases before the ICC, arrest warrants on crimes of sexual violence have been issued, but the suspects remain at large. The first case is the *Prosecutor v. Joseph Kony et al.* in Situation Uganda, which deals with rape and sexual slavery as war crimes and crimes against humanity. Other two cases are those of the *Prosecutor v. Al Bashir* (rape as crime against humanity) and the *Prosecutor v. Abd Al-Rahman and Harun* (rape as war crimes and crimes against humanity) in Situation Darfur. An arrest warrant has also been issued in Situation DRC against Sylvestre Mudacumura, for mutilation (including genital mutilation) and rape as a war crime. The confirmation of charges in the *Ntaganda case*, for rape and sexual slavery as crimes against humanity and war crimes, among other crimes, is expected to start in February 2014, after the suspect surrendered voluntarily to the ICC. In Situation Cote d'Ivoire, former President, Laurent Gbagbo is currently awaiting the confirmation of charges in his case, which involves, among others, crimes of rape and sexual violence. Finally, in the Case of the *Prosecutor v. Callixte Mbarushimana*, the charges included crimes with a wide variety of conducts of sexual violence allegedly committed in Kivu, DRC, The Pre-Trial Chamber however did not confirm these crimes and the Appeals Chamber dismissed the prosecution's appeal to the confirmation of charges decision. See: *Katanga and Ngudjolo case* 'Mandat d'arrêt à l'encontre de Germain Katanga' (18 October 2007) ICC-01/04-01/07-1; 'Mandat d'arrêt à l'encontre de Mathieu Ngudjolo Chu' (7 February 2008) ICC-01/04 02/07-260. Mr Ndgujolo Chui was acquitted of all charges on 18 December 2013 (Jugement rendu en application de l'article 74 du Statut, ICC-01/04-02/12-3) ; *Kenyatta and Muthaura case* 'Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute'(23 January 2012) ICC-01/09-02/11-382-Red paras 254-266; The Prosecutor v Omar Hassan Ahmad Al Bashir ICC-02/05-01/09 (*Al Bashir case)* and The Prosecutor v Ahmad Muhammad Harun and Ali Muhammad Ali Abd-Al-Rahman (*Ahmad Harun and Ali Kushayb case*) ICC-02/05-01/07; The Prosecutor v Sylvestre Mudacumura (*Mudacumura case)* 'Decision on the Prosecutor's Application under Article 58' (13 July 2012) ICC-01/04-01/12-1-Red; The Prosecutor v Sylvestre Mudacumura (*Mudacumura case)* 'Decision on the Prosecutor's Application under Article 58' (13 July 2012) ICC-01/04-01/12-1-Red; The Prosecutor v Bosco Ntaganda (*Ntaganda case)* 'Decision on the Prosecutor's Application under Article 58' (13 July 2012) ICC-01/04 02/06-36-Red; *Ntaganda case*, Decision on the "Prosecution's Urgent Request to Postpone the Date of the Confirmation Hearing" and Setting a New Calendar for the Disclosure of Evidence Between the Parties, 17 June 2013, ICC-01/04-02/06-73; *Gbagbo case* 'Warrant of Arrest for Laurent Koudou Gbagbo' (30 November 2012) ICC02/11 01/11-1; The Prosecutor

situations, such as fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent. It is important to also note that in footnote 16, the Elements of Crimes clarify that a person may be incapable of giving genuine consent if affected by natural, induced or *age-related* capacity. This undoubtedly relates to children and the cases of statutory rape, in which there is a presumption of lack of consent due to the child's age.

Pre-Trial Chamber II in the *Bemba case* determined that "coercion" does not require physical force, and "threats, intimidation, extortion and other forms of duress which prey on fear or desperation may constitute coercion, and coercion may be inherent in certain circumstances, such as armed conflict or military presence".[102] Also in the *Bemba case*, when the defence challenged at the confirmation stage that some of the alleged victims had entered into sexual relations with soldiers on a voluntary basis, the Pre-Trial Chamber rejected the defence's challenge, stating that this apparently concerned a small number of women.[103]

In the SCSL, the Trial Chamber in the *AFRC case* determined that consent can only be granted freely and must be determined in light of the surrounding circumstances. The SCSL found that although force or threat of force is indicative of lack of consent, they are not *per se* elements of rape. The SCSL stated that other factors that might render the act non-consensual or non-voluntary should be considered and that in cases of armed conflict or detention, coercion is almost universal. In regards to children, the SCSL also explained that children

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v Callixte Mbarushimana (*Mbarushimana case)*'Decision on the confirmation of charges' (16 December 2011) ICC-01/04-01/10-465-Red; 'Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I of 16 December 2011 entitled "Decision on the confirmation of charges"'(30 May 2012) ICC-01/0401/10-514.

101 After extensive lobbying from women's rights organisations and two female judges of ICTY (Judges Odio Benito and McDonald), the judges of ICTY adopted Rule 96 of the Rules of Procedure and Evidence, which were also later included in the ICTR Rules. Rule 96 of ICTY and ICTR, and its successor Rule 70 of ICC's RPE, provide that no corroboration of the victim's testimony is required, that consent shall not be allowed as a defence, except in limited circumstances, and that no evidence on prior sexual conduct of the victim may be introduced. Rules 70, 71 and 72 of the RPE are the minimum safeguards to the well-being and dignity of victims and witnesses of sexual violence that should be taken into consideration by the ICC. See: Kathy Hall-Martinez and Barbara Bedont, 'Ending Impunity for Gender Crimes under the International Criminal Court' (1999) *The Brown Journal of World Affairs*, 65-86.

102 *Bemba* case 'Decision pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo' (15 June 2009) ICC-01/05-01/08-424, para. 162.

103 *Bemba* case 'Decision pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo' (15 June 2009) ICC-01/05-01/08-424, paras 167-168.

under the age of 14 could not give consent.[104] The SCSL concluded that given the attacks suffered by the victims (murders of their relatives, the context of violence, threats, abductions and subsequent confinements) it was clear that the victims could not have consented to the repeated acts of sexual intercourse. Also, the SCSL determined that these same factors indicate that the perpetrators could not have thought that these victims had consented to their acts.[105]

In the *Taylor case*, the Trial Chamber concluded that a person may be incapable of granting genuine consent "if affected by natural, induced or age related incapacity". The SCSL further determined that the circumstances of an armed conflict, where rape occurs on a large scale, coupled with the social stigma that is borne by its victims, "render the restrictive test" set out in the elements of the crime difficult to satisfy. The Chamber therefore concluded that circumstantial evidence might be used to demonstrate the *actus reus* of rape.[106]

As for the specific crimes of sexual violence, in particular *rape*, it is important to note that the Elements of Crimes clearly establish the gender-neutral nature of this crime, as it can be committed and suffered equally by men or women.[107] In fact, in the *Bemba case*, the Pre-Trial Chamber referred to a case of rape of a male victim in its confirmation of charges decision.[108]

As for the crime of *sexual slavery* the Elements of Crimes require firstly that the perpetrator exercised any or all of the powers attached to the right of ownership over one or more persons, such as by purchasing, selling, lending or battering such person or persons or by imposing on them a similar deprivation of liberty.[109] As regards the element of force or coercion for this crime, the Special Rapporteur on systematic rape, sexual slavery and slavery-like practices during armed conflict has pointed out that the mere ability to extricate oneself at substantial risk of personal harm from a condition of slavery should not be interpreted as nullifying a claim of slavery and that in all cases

104 *AFRC case* 'Sentencing Judgment' (19 June 2007) SCSL 04-16-624, paras 694-695.
105 *AFRC case* 'Sentencing Judgment' (19 June 2007) SCSL 04-16-624, paras 966-1068.
106 *Taylor case* 'Judgment' (18 May 2012) SCSL 03-01-1281, para. 155.
107 The first element, which is "penetration", may involve not only the vagina but also the anus, and penetration can be committed with body parts but also with objects.
108 *Bemba* case 'Decision pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo' (15 June 2009) ICC-01/05-01/08-424, paras 171-172.
109 As stated by Boot, although sexual slavery is listed as a separate offence, it should be considered as a particular form of the general crime of slavery, which also includes trafficking in persons, in particular women and children. See: Boot and Hall in: Otto Triffterer (ed), *Commentary on the Rome Statute of the ICC: Observers' Notes, Article by Article* (2nd Edn, Nomos Verlagsgesellschaft 2008) 211; Kathy Hall-Martinez and Barbara Bedont, 'Ending Impunity for Gender Crimes under the International Criminal Court' (1999) *The Brown Journal of World Affairs*, 65-86.

a subjective gender-conscious analysis should be applied.[110] It could be added that in cases of children, an age-conscious analysis should also be applied when interpreting whether the victim had reasonable fear of harm or perceived coercion. In this sense, the Trial Chamber in the *Taylor case* determined that the element of "deprivation of liberty" of slavery is fulfilled when the victim is not physically confined, but is "otherwise unable to leave the perpetrator's custody as they would have nowhere else to go and feared for their lives".[111]

The "sexual" nature of the slavery requires that the perpetrator caused the victim(s) to engage in one or more acts of a sexual nature. As noted by the Special Rapporteur, sexual slavery also encompasses situations where women and girls are forced into "marriage", domestic servitude or other forced labour that ultimately involved forced sexual activity as well as "enforced prostitution".[112] Since "enforced prostitution" is defined as a separate crime under Article 7 of the Statute, it will ultimately depend on the prosecutorial strategy whether charges are brought against individuals for either crimes of "sexual slavery", "enforced prostitution" or even "forced marriage" or the general crime of "other forms of sexual violence". The pre-trial chambers could also request an amendment of charges so that they reflect one of these crimes, and ultimately the trial chambers could consider reclassification of charges under Regulation 55 of the RoC if they deem that such conduct falls within one or another sexual crime.

The Elements of Crimes of *enforced prostitution* requires, as an additional element, that the perpetrator or another person obtained or expected to obtain pecuniary or other advantage in exchange for or in connection with the acts of a sexual nature. This crime, however, does not require "exercise of any or all the powers attaching to the right of ownership over one or more persons", which is an element of the crime of sexual slavery. Thus, it could be argued that charges for the crime of enforced prostitution could be helpful to prosecute cases in which this element of sexual slavery is not easily proven or for "slavery like" situations.[113] However, as pointed out by the Special Rapporteur, most cases of forced prostitution also amount to sexual slavery and could more appropriately be characterised as such.[114]

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110 UN Sub-Commission on the Promotion and Protection of Human Rights, *Systematic Rape, Sexual Slavery and Slavery-like Practices during Armed Conflict : Final Report Submitted by Gay J McDougall, Special Rapporteur* (22 June 1998) E/CN.4/Sub.2/1998/13, para. 28.

111 *Taylor case* 'Judgement' (18 May 2012) SCSL 03-01-1281, para. 420.

112 UN Sub-Commission on the Promotion and Protection of Human Rights, *Systematic Rape, Sexual Slavery and Slavery-like Practices during Armed Conflict : Final Report Submitted by Gay J McDougall, Special Rapporteur* (22 June 1998) E/CN.4/Sub.2/1998/13, paras 30 and 31.

113 Kathy Hall-Martinez and Barbara Bedont, 'Ending Impunity for Gender Crimes under the International Criminal Court' (1999) *The Brown Journal of World Affairs*, 65-86.

114 UN Sub-Commission on the Promotion and Protection of Human Rights, *Systematic Rape, Sexual Slavery and Slavery-like Practices during Armed Conflict : Final Report Submitted by Gay J McDougall, Special Rapporteur* (22 June 1998) E/CN.4/Sub.2/1998/13, para. 33.

Article 7(2)(f) and the Elements of Crimes state that the term *enforced pregnancy* means the unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law.[115]

The Elements of Crimes define *enforced sterilization* as the deprivation of one or more victims of their biological reproductive capacity with permanent effects (excluding non-permanent birth-control measures). The only defences admissible for this crime are when the conduct was justified by the medical or hospital treatment of the person(s) concerned or when this was carried out with the person's consent.[116]

The last conduct of sexual violence provided for in Article 7(1)(g) is "*any other form of sexual violence of comparable gravity*", which could arguably be a "blank cheque" for the prosecution of an array of conducts not necessarily falling within the elements of either of the crimes of sexual violence identified above. The common element it shares with other crimes of sexual violence is that of force, threat of force or coercion. The Elements of Crimes only provide that the conduct shall be "of a gravity comparable to other offences" of sexual violence, and, as stated by Schabas, these "other forms of sexual violence" could also be prosecuted as "other inhumane acts".[117] The SCSL has defined "other forms of sexual violence" as a residual category of sexual crimes that may include an unlimited number of acts insofar as they are of a sexual nature and are inflicted upon the victim by means of coercion, threat of force or intimidation.[118]

A clear example of "other forms of sexual violence" that affects girls in particular is the customary practice in some countries to commit female genital mutilation. Also forms of sexual violence committed against men and boys could be included within this rather general provision.[119] Regretfully though, in the case of The Prosecutor v Francis Kirimi Muthaura and Uhuru Muigai

115 The Elements of Crimes clarify that this definition shall not in any way be interpreted as affecting national laws relating to pregnancy. This clarification, which was inserted in the Rome Statute as a result of the insistent pressure of some religious groups, responds to political views against abortion and domestic laws penalising abortion. See: William Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (Oxford University Press 2010) 173. The author states that this component was most controversial since it raised the issue of abortion.

116 Boot argues, however, that the exception excluding temporary methods of birth control could be inconsistent with international law, namely human rights law. See: Boot and Hall in: Otto Triffterer (ed), *Commentary on the Rome Statute of the ICC: Observers' Notes, Article by Article* (2nd Edn, Nomos Verlagsgesellschaft 2008) 214.

117 William Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (Oxford University Press 2010) 175.

118 *AFRC case* 'Sentencing Judgment' (19 June 2007) SCSL 04-16-624, para. 720.

119 Sandesh Sivakumaran "Prosecuting Sexual Violence against Men and Boys" in Anne-Marie De Brouwer and others (ed.) *Sexual Violence as an International Crime: Interdisciplinary Approaches*, Intersentia (2011), 79-97.

Kenyatta *(Muthaura and Kenyatta case)*, the Pre-Trial Chamber declined to confirm the charges of sexual violence in the form of penile mutilation. In the view of the Pre-Trial Chamber the "sexual" element was missing. The Pre-Trial Chamber rejected the prosecution's submission "that these weren't just attacks on men's sexual organs as such but were intended as attacks on men's identities within their society and were designed to destroy their masculinity". In the Pre-Trial Chamber's view, "not every act of violence which targets parts of the body commonly associated with sexuality should be considered an act of sexual violence". It therefore concluded that these acts were "severe physical injuries" that "were motivated by ethnic prejudice and intended to demonstrate cultural superiority of one tribe over the other".[120] However, considering that the penis is perhaps the most sexualised body part of any man, one could argue that its mutilation has an inherent and undeniable sexual nature, as means of attacking the victims' sexual identity and self-worth. In the end, it is through an attack to the male victims' sexuality that the "cultural superiority of one tribe over the other", as stated by the Pre-Trial Chamber, could be attained. Notwithstanding the Pre-Trial Chamber's determination, as stated above, trial in the *Kenyatta case* is yet to begin, and the facts could be recharacterised under Regulation 55 of the RoC in order to include the criminal conduct of "other forms of sexual violence" committed against male victims in this case.[121]

4.4.1.2 Charges of sexual violence and cumulative charging and duplicity of charges

An important aspect that should be taken into consideration when analysing crimes of sexual violence is whether charges brought against individuals for multiple types of sexual violence are valid, particularly whether they are not duplicating charges on the basis of the same criminal conduct and thus erring in the use of cumulative charging. In fact this issue was at stake in the Trial Chamber's judgment in the *AFRC case* at the SCSL and was also an issue in the confirmation of charges in the *Bemba case* at the ICC.

In the *AFRC case*, the SCSL Trial Chamber dismissed the prosecution's charges of "other forms of sexual violence" since it deemed this violated the rule against duplicity of charges. The Trial Chamber found that the SCSL Statute "encapsulates five distinct categories of sexual offences, each of which is comprised of separate and distinct elements" and held that count 7 charged the appellant with two distinct crimes against humanity in one count, namely

120 *Kenyatta and Muthaura case*, 'Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute' (23 January 2012) ICC-01/09-02/11-382-Red, paras 264-266.

121 Charges against Mr Muthaura were dropped on 11 March 2013. See: *Kenyatta and Muthaura case* 'Prosecution notification of withdrawal of the charges against Francis Kirimi Muthaura' (11 March 2013) ICC-01/09-02/11-687.

"sexual slavery" and "any other form of sexual violence".[122] The Trial Chamber therefore found that count 7 prejudiced the accused's rights and dismissed the count in its entirety. The Trial Chamber also dismissed the charges of sexual violence as "other inhumane acts". It considered that given the exhaustive list of sexual crimes covered under the SCSL Statute "rape, sexual slavery, enforced prostitution, forced pregnancy and any other form of sexual violence," "other inhumane acts" must only cover acts of a non sexual nature that constitute an affront to human dignity.[123] The Trial Chamber held, by a majority, that the evidence presented by the prosecution was subsumed in its entirety by the crime of sexual slavery and that there was no *lacuna* in the law that would justify a separate crime of forced marriage as another inhumane act. Thus, the Trial Chamber dismissed count 8 which charged the accused with inhumane acts.[124] Judge Doherty, in her dissenting opinion, concluded that forced marriage is a different crime from sexual slavery due to the conjugal status forced on these women and the social stigma that is associated with being a "bush wife" or "rebel wife" which causes mental suffering.[125]

In the AFRC Appeals Judgment, the Appeals Chamber, agreeing with the Trial Chamber, determined that the prosecution had effectively violated the rule against duplicity by charging two offences in the same count as regards sexual slavery and other forms of sexual violence.[126] However, referring to "other inhumane acts", the Appeals Chamber concluded that the Trial Chamber erred in finding that Article 2.1 of the SCSL Statute on "other inhumane acts" excludes sexual crimes. The Appeals Chamber noted that international jurisprudence has shown that a wide range of criminal acts, including sexual crimes, have been recognised under this residual provision of "other inhumane acts".[127] The Appeals Chamber stated that a determination on whether a conduct falls within this category should be made "on a case-by-case basis taking into account the nature of the alleged act or omission, the context in which it took place, the personal circumstances of the victims including age, sex, health and physical, mental and moral affects of the perpetrator's conduct upon the victims".[128] The Appeals Chamber saw no reason why crimes that have a sexual or gender component should not be considered part of this crime against humanity.[129] Regarding the nature of the crime of "forced marriage", the Appeals Chamber quashed the Trial Chamber's findings although it decided not to enter a conviction on this charge. The Appeals Chamber con-

122 *AFRC case* 'Sentencing Judgment' (19 June 2007) SCSL 04-16-624, para. 94.
123 *AFRC case* 'Sentencing Judgment' (19 June 2007) SCSL 04-16-624, para. 697.
124 *AFRC case* 'Sentencing Judgment' (19 June 2007) SCSL 04-16-624, paras 711-714
125 *AFRC case* 'Partly Dissenting Opinion of Justice Doherty on Count 7 (sexual slavery) and Count 8 ('forced marriages')' (19 June 2007)SCSL 04-16-624 para. 49.
126 *AFRC case* 'Judgment' (22 February 2008) SCSL-04-16-675, para. 102.
127 *AFRC case* 'Judgment' (22 February 2008) SCSL-04-16-675, paras 183-184.
128 *AFRC case* 'Judgment' (22 February 2008) SCSL-04-16-675, para. 184.
129 *AFRC case* 'Judgment' (22 February 2008) SCSL-04-16-675, para. 186.

cluded that "no tribunal could reasonably have found that forced marriage was subsumed in the crime against humanity of sexual slavery". Among the reasons it gave to justify its conclusions, the Appeals Chamber referred to the conjugal forced nature of the crime and the particular serious harms it causes on the victim. The Appeals Chamber also stated that unlike sexual slavery, the crime of forced marriage implies a relationship of exclusivity with consequences for the victim if this "marriage" is breached. The Appeals Chamber also determined that forced marriage goes beyond the sexual element, and encompasses another conduct (*i.e.* forced domestic labour).[130] The Appeals Chamber finally decided that the notion of "other inhumane acts" forms part of customary international law and is a "residual category designed to punish acts or omissions not specifically listed as crimes against humanity" and thus "forced marriage" can be included within this crime.[131]

More recently, in the *Taylor case*, the SCSL Trial Chamber stated that the concept of "forced marriage" is a misnomer for the forced conjugal association that was imposed on women and girls in circumstances of armed conflict, and which involves: a) sexual slavery; and b) forced domestic work.[132] The SCSL also emphasised that the word "marriage" and "husband" in the context of such a crime was inappropriate and unhelpful.[133] The SCSL Trial Chamber though adopted the concept of "conjugal slavery", as it considered it more appropriate than "forced marriage". That Chamber further stated that this "conjugal slavery" is more than sexual slavery, as it involves also a forced conjugal relationship and forced domestic work.[134]

At the ICC, the prosecution charged Jean-Pierre Bemba with crimes against humanity and war crimes of rape, torture, murder, pillage and outrages upon personal dignity.[135] However, the Pre-Trial Chamber did not confirm all the charges and dismissed the charges of torture and outrages upon personal dignity as it concluded that these charges incorrectly used the principle of cumulative charging. In the opinion of the Pre-Trial Chamber, the acts of torture and outrages upon personal dignity included in the charges (namely family members watching relatives getting raped) did not encompass a distinct

130 *AFRC case* 'Judgment' (22 February 2008) SCSL-04-16-675, paras 195-196.
131 *AFRC case* 'Judgment' (22 February 2008) SCSL-04-16-675, para. 198.
132 *Taylor case* 'Judgement' (18 May 2012) SCSL 03-01-1281, para. 425.
133 *Taylor case* 'Judgement' (18 May 2012) SCSL 03-01-1281, para. 426.
134 *Taylor case* 'Judgement' (18 May 2012) SCSL 03-01-1281, para. 428. The conduct of forced marriage is further analysed below in the section below on duplicity of charges.
135 *Bemba case*, 'Prosecution's submission of Amended Document Containing the Charges and Amended List of Evidence pursuant to the Third Decision on the Prosecutor's Requests for redactions and related request for the Regulation of Contacts of Jean-Pierre Bemba Gombo'(19 November 2008) ICC-01/05 01/08-264; 'Prosecution's Submission of Amended Document Containing the Charges, Amended List of Evidence and Amended In-Depth Analysis Chart of Incriminatory Evidence'(30 March 2009) ICC-01/05-01/08-395.

element from the crime of rape and should be subsumed in the charge of rape.[136] The prosecution requested leave to appeal the Pre-Trial Chamber's decision and the Women's Initiative for Gender Justice was granted leave to present an *amicus curiae* brief on the prosecution's request for leave to appeal. In its brief, the Women's Initiative for Gender Justice stated the following:[137]

> '(…) infliction of humiliating and degrading conduct is a stand-alone crime. The elements of rape do not require humiliation, degradation, or otherwise violation of dignity as part of the act. The Amicus recognizes that the intra-family nature of public rapes were humiliating, degrading and an infliction upon dignity; however, the description of the outrages upon the personal dignity element should not be conflated to satisfy the element of force or coercion of the crime of rape.'

Most importantly, the *amicus curiae* brief submitted that such a narrow interpretation contravened internationally recognised human rights, namely the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) and the CRC, and the principle of non-discrimination on grounds of gender. However, the Pre-Trial Chamber denied leave to appeal and the issue thus remains unconfirmed by the Appeals Chamber.[138] As noted by Oosterveld, given the Pre-Trial Chamber's reasoning, and the lack of Appeals Chamber guidance, there is a risk that underlying acts such as the crime against humanity of rape charged alongside other crimes (such as persecution), might be rejected for being "cumulative" in future ICC cases.[139]

4.4.2 Intentional attacks against schools and other civilian objects and humanitarian objects

Article 8 of the Rome Statute, which defines war crimes under the jurisdiction of the ICC, includes several crimes on attacks to objects protected by international humanitarian law. Article 8(2)(b)(ii) prohibits attacks to civilian objects. Likewise, Article 8(2)(b)(iii) and 8(2)(e)(iii) prohibit attacks to humanitarian personnel and objects. Article 8(2)(b)(v) prohibits attacks to undefended civilian places, such as towns, villages or buildings that are not military objectives.

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136 *Bemba case*, 'Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo' (15 June 2009) ICC-01/05-01/08-424.

137 *Bemba case*, 'Amicus Curiae Observations of the Women's Initiatives for Gender Justice pursuant to Rule 103 of the Rules of Procedure and Evidence' (31 July 2009) ICC-01/05-01/08-466 para. 29.

138 'Decision on Prosecutor's Application for Leave to Appeal the "Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo"'(18 September 2009) ICC-01/05-01/08-532.

139 Valerie Oosterveld, "Prosecuting Gender-Based Persecution as an International Crime" in Anne-Marie De Brouwer and others (ed.) *Sexual Violence as an International Crime: Interdisciplinary Approaches*, Intersentia (2011), 75.

Articles 8(2)(b)(ix) and 8(2)(e)(iv) prohibit attacks to protected objects for reasons of religion, education, art, science and charitable purposes, historic monuments and public health places.

All these crimes, although intended to protect civilian persons and objects in general, may have disproportionate effects upon children, not only because they represent a significant part of the civilian population in current armed conflicts, but also because very often they use these specially protected objects, such as schools, day-care centres, community centres, and other public health and welfare objects.

In fact, in 2008, the CRC Committee hosted a day of discussion on education in emergency situations and in its final recommendations urged State Parties to the CRC to fulfil their obligation to ensure that schools are zones of peace and places where intellectual curiosity and respect for universal human rights is fostered; and to ensure that schools are protected from military attacks or seizure by militants; or use as centres for recruitment.[140] Following this same line, the UNGA adopted in July 2010 a Resolution on the right to education in emergency situations and urged all parties to armed conflicts to fulfil their obligations under international law to refrain from attacking civilian objects and persons, particularly students and schools.[141]

Likewise, it is important to analyse the crime of intentional attacks to schools or other civilian objects in relation to other crimes committed against children, particularly the crime of child recruitment. Very often, military groups attack schools, boarding schools or other buildings used by children, in order to carry out recruitment campaigns in which children under the age of 15 are either conscripted or enlisted. Therefore, this crime could very often be included in the charges brought against perpetrators of crimes of enlistment, conscription and use of children under the age of 15 to actively participate in hostilities. For example, in the warrant of arrest against Joseph Kony, the Pre-Trial Chamber stated that the Lord Resistance Army had allegedly attacked villages and internally displaced camps (IDP camps) in order to recruit children.[142] Consequently, the charges in this case not only include the crime of enlistment, conscription and use of children under 15, but also crimes such as intentional attacks against civilian population, particularly IDP camps. In the *Lubanga case*, for example, the three victims who came to testify in court referred to an alleged attack to a school, where individuals were beaten and children were allegedly recruited.[143] Although no charges of intentional

140 CRC Committee, *The Right of the Child to Education in Emergency Situations: Recommendations* (49th Session, Day of General Discussion on 19 September 2008) para. 35.

141 UNGA, *The Right to Education in Emergency Situations: Resolution Adopted by the General Assembly* (27 July 2010) A/RES/64/290.

142 *Kony and others case,* 'Warrant of Arrest for Joseph Kony issued on 8 July 2005 as amended on 27 September 2005' (27 September 2005) ICC 02/04 01/05-53, 6.

143 *Lubanga case*, Transcript of hearing (12 January 2010) ICC-01/04-01/06-T-225-Red-ENG WT.

attacks to schools were brought against the accused in that case, considering the testimony of these victims, this could have been possible.

4.5 CONCLUSIONS

Children suffer from international crimes in a differentiated manner, and thus the requirements under the Elements of the Crimes within the ICC jurisdiction may be met distinctively if the crime is committed against a child. Thus, a children's rights perspective is important to achieve successful investigations and prosecutions of crimes within the ICC's jurisdiction committed against children. However, the analysis of the Elements of the Crimes and the concepts adopted by Chambers to define these crimes should always adhere to the principle of legality, as a fundamental right of the accused person and a cornerstone of the ICC's jurisdiction.

Depending on the definition given to the crimes committed against children, pursuant to the Rome Statute, the Elements of the Crimes, but also in light of other applicable law in accordance with Article 21 of the Rome Statute, children and their families may be granted status to participate in proceedings pursuant to Article 68(3) of the Rome Statute. Thus, the broader the concept adopted by ICC Chambers (although limited to the principle of legality), the more access victims of these crimes will have to ICC proceedings. The same applies for victims who may benefit from reparations. At the end, depending on how ICC judges define these crimes (either broader or stricter) so will be the concept of "beneficiaries" of eventual reparations orders.

Although in this chapter those crimes that mostly affect children are analysed, children may be victims of any crime within the ICC's jurisdiction. Hence, while children may seldom appear before the ICC in cases in which they are not a material element of the crime (*i.e.* child recruitment), ICC cases for other crimes could still include a children's rights perspective. In such cases, advocates of victims could play an important role in order to express through their "views and concerns" the harms suffered by children as a consequence of these other crimes. In a sense, all international crimes, even if committed exclusively against adults, will have a lasting effect on children. For example, persecution of men of an ethnic group may have as a consequence the displacement of entire villages, families, and ultimately children who grow up far away from their birthplaces and receive limited or no healthcare and education. Thus, although child victims of these "other cases" may not come in person to participate as victims or testify as witnesses before the ICC, they could, for example, benefit from reparations, if the harms they suffered are taken into account.

However, it is ultimately within the Prosecutor's hands (his/her discretion and policy) to include the children's dimension of crimes being investigated and prosecuted by the OTP. The Prosecutor should continue the policy adopted

so far that recognises that crimes committed against children should be regarded as "most serious crimes" within the ICC's jurisdiction.[144] However, also as regards cases for "other crimes", the effects that these crimes have on children could also be included in the charges brought against accused persons, so that they are considered in eventual convictions, sentencing and ultimately reparations orders.

144 ICC Office of the Prosecutor, *Prosecutorial Strategy 2009-2012* (1 February 2010) paras 20-30<http://www.icc-cpi.int/NR/rdonlyres/66A8DCDC-3650-4514-AA62-D229D1128F65/281506/OTPProsecutorialStrategy20092013.pdf> accessed 8 August 2013.

5 Children's interaction with the ICC

5.1 INTRODUCTION

Children can interact with the ICC as *witnesses* to the defence, the prosecution or the Chamber. As such, they have the right to be protected (Article 68(1) of the Rome Statute) and to other safeguards provided for in the RPE (for example, protective and special measures under Rules 87 and 88 of the RPE or protection to witnesses of sexual violence under Rules 70 and 71 of the RPE). Secondly, in accordance with Article 68(3) of the Rome Statute, children may interact with the ICC as *participating victims*, who can present their views and concerns at various stages of the proceedings when their interests are affected.[1] Lastly, children can interact with the ICC in order to benefit from *reparations* for the harms suffered as a result of a crime within the jurisdiction of the ICC, as provided for in Article 75 of the Rome Statute.

Children may have dual status as witnesses and victims with participatory status. And ultimately, a dual status individual could also receive reparations. Thus, the same child could interact with the Court within all three categories identified above. However, his or her rights will vary, depending on whether his or her interaction is as a witness testifying under oath, a participating victim or a beneficiary of reparations. Moreover, as, depending on the child's interaction with the ICC, his or her interaction may have a different impact on the rights of the accused, a balance must be found at all times in order to guarantee the access of children to the ICC proceedings, in a manner that is respectful to the rights of the accused and a fair trial.

This Chapter will analyse the existing legal framework and case law of the ICC from a children's rights perspective, applying and interpreting ICC provisions in accordance with internationally recognised children's rights and taking into consideration crimes committed against children that have been or can be brought before the ICC. It will aim to provide recommendations on how this practice can be adjusted to better meet the particular needs and rights of children interacting with the ICC, particularly in light of Rule 86 of the RPE, which requires that the needs of children are taken into consideration throughout all ICC proceedings.

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1 As noted in the Introduction, the term child victim also includes victims who make representations in accordance with Articles 15(3) and 19(3) of the Rome Statute.

5.2 Reaching out for Children

Article 68(3) of the Rome Statute grants victims the opportunity to express their views and concerns in criminal proceedings before the ICC. Furthermore, Article 75 of the Rome Statute grants victims the right to receive reparations for harms suffered as a result of crimes under the ICC's jurisdiction. However, victims will only apply for participation or reparations before the ICC if they are aware of its existence and their rights before this international tribunal. Outreach is thus of great importance as it enables the ICC to inform victims of the possibility they have to participate in international criminal proceedings. As stated by the CRC Committee, the right to information is to a large degree a prerequisite for the effective realization of children's right to express their views and concerns.[2] Moreover, the CRC Committee has also stated that the right to information is essential, because it is the precondition of the child's clarified decisions.[3]

For example, child victims must be appropriately informed about the application process, modalities of participation, forms of reparations and they must receive feedback from the ICC, either if their applications for participation and/or reparations are accepted or rejected. Children who are interviewed as potential witnesses also need to be informed about the judicial process, risks involved, available protective measures, etc. Moreover, child victims should also be informed about the impact their participation will have on the outcome of a trial and they should not have unreal expectations.[4] Potential child witnesses who are later not called to testify should also receive feedback from the ICC so that their interaction with the ICC does not become a source of frustration.[5]Although this is required for all witnesses, including adults, information needs to be provided to children in a manner that is accessible and understandable to them, taking into consideration their age and maturity. Moreover, as noted by the CRC Committee, children who express their views in judicial proceedings should receive feedback in order to guarantee that their views are not only heard as a formality, but are actually taken seriously.[6] Thus the importance of outreach, as it is a two-way sharing of information between child victims and witnesses and the ICC.

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2 CRC Committee, *General Comment No. 12 (2009): The right of the child to be heard* (20 July 2009) CRC/C/GC/12, para. 82.

3 CRC Committee, *General Comment No. 12 (2009): The right of the child to be heard* (20 July 2009) CRC/C/GC/12, para. 25.

4 CRC Committee, *General Comment No. 12 (2009): The right of the child to be heard* (20 July 2009) CRC/C/GC/12, para. 41. See also UN Guidelines.

5 ICTJ, *Outreach Strategies in International Hybrid Courts: Report of the ICTJ-ECCC Workshop, Phnom Penh, March 3-5 2010* (Workshop Report 2010) 13.

6 CRC Committee, *General Comment No. 12 (2009): The right of the child to be heard* (20 July 2009) CRC/C/GC/12, para. 45.

Recently in the Kenya Situation, Trial Chamber V emphasised the importance of informing witnesses of all the implications of testifying before the ICC, including the eventual disclosure of information to other parties in the proceedings, and possible consequences for the witness. The Chamber highlighted that informing the witness, and thus keeping him/her in control of his or her situation, may avoid traumatisation.[7]

The UN Guidelines also state that child victims and witnesses should be provided support throughout their involvement in the justice process.[8] The word "throughout" in the UN Guidelines is of particular importance, since the concept of who is a victim or a witness should be broad enough to encompass those situations in which a child is first approached by the ICC, although not necessarily falling within the strict category of a trial witness or participating victim (*i.e.* a victim who has filled-in an application form for participation but is awaiting a decision from the Chamber, or a witness that has been withdrawn from the trial witnesses' list). Support should start at the earliest opportunity and continue uninterrupted throughout the entirety of the person's involvement with the ICC.

Outreach, which has been defined as the set of tools (materials and activities) that are put in to build direct channels of communication with the affected communities, in order to raise awareness of the justice process and promote understanding of the measure, is a function of the ICC that is essential to meet the requirements of information and consequently of consent explained above.[9] The Outreach Unit at the ICC has defined it as a process of establishing sustainable, two-way communication between the ICC and communities affected by the situations that are subject to investigations or proceedings, and to promote understanding and support of the judicial process at various stages as well as the different roles of the organs of the ICC.[10]

Outreach has indeed been identified as a non-judicial core function of the ICC since making judicial proceedings available to the public is a central element of a fair trial and therefore necessary to ensure the quality of justice.[11] In fact, as stated by Vinck and Pham, to the extent that affected communities

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7 *Ruto and Sang case,* 'Decision on the protocol concerning the handling of confidential information and contacts of a party with witnesses whom the opposing party intends to call' (24 August 2012) ICC-01/09-01/11-449, Annex 1, paras 26-32.

8 UN Guidelines, para. 30(a).

9 ICTJ, *Making an impact: Guidelines on Designing and Implementing Outreach Programs for Transitional Justice* (January 2011) 3; ICTJ, *Through a New Lens: A Child-Sensitive Approach to Transitional Justice* (August 2011) 35. Available at <www.ictj.org> accessed 31 August 2012.

10 *ICC, Structure of the Court, Outreach,* <http://www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Outreach/> accessed 31 August 2012.

11 ICC, PIDS, *Outreach Report 2010*, 81. Available at: <http://www.icc-cpi.int/menus/icc/structure%20of%20the%20court/outreach/outreach%20reports/icc%20outreach%20report%202010> accessed 31 August 2012.

have never heard about the ICC, none of the broader goals of international justice can be achieved.[12]

Although the importance of outreach may be challenged for not being a judicial function of the ICC, it is important to consider the purpose and objective of the ICC in order to understand the positive consequences that outreach has in the overall work of this international tribunal. The ICC was not only established to investigate, prosecute and convict perpetrators of serious international crimes, but also to redress suffering of victims of these crimes, namely by allowing them to participate in proceedings and to receive reparations. In the ICC's first-ever decision on victims' participation, Pre-Trial Chamber I stated that Article 68(3) of the Rome Statute imposes an obligation of the ICC vis-à-vis victims and entails a positive obligation for the ICC to enable them to exercise that right concretely and effectively. The Chamber went further stating that the ICC has a dual obligation: on the one hand to allow victims to present their views and concerns, and on the other, to examine them.[13]

In fact, Article 68(3) of the Rome Statute provides that the Court "shall permit" that the views and concerns of victims be presented and considered in ICC proceedings. This provision makes it clear that the possibility of victims to present their views and concerns and that the obligation of the Court to consider these during the proceedings is not discretionary but obligatory.[14] In fact one could argue that the burdensome individual application process adopted in the ICC's first cases (which is not foreseen in the Statute but was later developed in the RPE, Regulations of the Court and subsequent practice) could be hampering the fulfilment of this obligation by the ICC.

The ICC has the obligation to guarantee that child victims participation in ICC proceedings and eventual reparations in case of a conviction are respectful of their well-being and security. This is provided for in Article 64(2) of the Rome Statute, which states that the Trial Chamber "shall ensure that a trial is fair and expeditious and is conducted with full respect for the rights of the accused and with due regard for the protection of victims and witnesses". Consequently, this provision embodies, along the concept of a "fair and expeditious trial" for the accused enshrined in Article 67 of the Rome

12 Patrick Vinck and Phuong Pham, 'Outreach Evaluation: the ICC in the Central African Republic' (2010) *International Journal of Transitional Justice*, 10. See also Sara Darehshori, 'Lessons Learned for Outreach from the ad hoc Tribunals, the Special Court for Sierra Leone and the ICC' *New England Journal of International and Comparative Law* (Volume 14:2) 299.

13 *DRC Situation* 'Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6' (17 January 2006) ICC-01/04-101-tEN-Corr, para. 71.

14 The English version of the Rome Statute uses the word "shall permit", which indicates an obligation of the Court. The French version of the Rome Statute refers to "permet" and the Spanish version to "permitirá". Although these two languages are not as clear as the phrase "shall permit" in the English version, they both reflect an affirmation of a right and not a mere possibility that can be discretionally granted to victims.

Statute, the "protection of victims and witnesses" provided for in Article 68 of the Rome Statute.

Child victims require access to information that is suitable to their age and maturity (*i.e.* what are the requirements for participation) in order for the ICC to accomplish its mandate. As stated by Vinck and Pham in their analysis of the outreach strategy of the ICC in the Central African Republic, public awareness of the justice mechanism is necessary for it to have a transformative impact on society and also to produce greater judicial accountability, educate on the rule of law and enable deterrence of future crimes and promote peace and reconciliation.[15]

This is provided for in the Preamble of the Rome Statute, which refers to putting an end to impunity for the perpetrators of these crimes and contributing to the prevention of such crimes. It is important to note that one of the triggering mechanisms of the ICC's jurisdiction is the *proprio motu* powers of the Prosecutor, who can request authorisation to start an investigation based on information received by inter-governmental and NGOs and other reliable sources. Only if victims and organisations working with victims are properly informed about the ICC's jurisdiction, will such information reach the ICC Prosecutor. Regarding crimes committed against children or the harms suffered by children as a result of crimes within the ICC's jurisdiction, public awareness of the ICC's jurisdiction and mandate is necessary so that information about these crimes is brought to the attention of the ICC Prosecutor.

In fact, outreach (or lack of it) was a "lesson learned" from the ad-hoc tribunals, which initiated outreach after several years of functioning, with harmful, inaccurate and biased local reporting which undermined the tribunals' impact.[16] The SCSL, on the other hand, started outreach at the earliest stages after its establishment and this was translated into greater knowledge about the SCSL in comparison, for example, with Rwandans over the ICTR.[17] This however, may not only be due to outreach, but also to the fact that the SCSL has seat in the place where the crimes occurred and has staff both from the national judicial system and from the international UN system. This could also be taken into consideration when deciding whether future ICC proceedings should take place *in situ*, and thus come geographically closer to the affected victim population.

In 2006, the ICC adopted a "Strategic Plan for Outreach at the ICC", which laid down the main objectives and principles of this essential part of the ICC's mandate. The main office in charge of developing and implementing outreach

15 Patrick Vinck and Phuong Pham, 'Outreach Evaluation: the ICC in the Central African Republic' (2010) *International Journal of Transitional Justice*, 2.

16 Patrick Vinck and Phuong Pham, 'Outreach Evaluation: the ICC in the Central African Republic' (2010) *International Journal of Transitional Justice*, 3.

17 Norman H Pentelovitch, 'Seeing Justice Done: The Important of Prioritizing Outreach Efforts at International Criminal Tribunals' (Spring 2008) *Georgetown Journal of International Law*, 452.

programmes is the PIDS, which is part of the Registry of the ICC. Already in the initial strategic plan, the ICC acknowledged the importance of having coordinated work between PIDS and other sections of the ICC, such as the VPRS.[18] The ICC also has field offices in the countries in which it is currently involved. These offices have outreach officials that carry out different activities in order to inform the local population about proceedings before the ICC and also receive feedback from these persons as regards the work of the ICC and the impact it has upon them. In fact, the ICC has recognised that in order to fulfil its mandate it is imperative that those communities affected by crimes under its jurisdiction understand its role and judicial activities, and also that a two-way dialogue exists between these affected communities and the ICC, so that the ICC can better understand the concerns and expectations of the communities.[19] This mandate is rather challenging. The ICC is currently involved in eight situations, so it should not only develop a global ICC Outreach strategy, but a tailor-made outreach strategy that accommodates the language, legal and cultural particularities and responds to the needs of the victims of each situation.

Additionally to a tailor-made approach regarding victims in the different situations before the ICC, outreach must also be designed taking into consideration the diversity within the population in a given situation before the ICC. Children should be one of those groups of the population towards which outreach must be aimed at. The UN Guidelines have recognised that children have the right to be informed about the processes and services that concern them.[20] In order to achieve this, outreach programmes should be designed so that they are relevant, age-appropriate and provide children with a safe and receptive environment.[21] Furthermore, information must be provided in such a manner that marginalized children (*i.e.* girls, migrants, etc.) are involved, taking into consideration that "children" is not a homogenous group.[22]

In its 2006 Strategy, the ICC already identified children and youth as "the most vulnerable victims of conflict" but also as dual actors in armed conflict, as they can be both perpetrators and victims. To this vulnerability, one can also add that children may very often be "information poor", which has been described by Vinck and Pham as "those who do not have access to formal media such as newspapers, radio or the Internet because they are socially or

18 ICC Assembly of States Parties, *Strategic Plan for Outreach of the International Criminal Court* (29 September 2006) ICC-ASP/5/12, para. 64.

19 ICC Assembly of States Parties, *Strategic Plan for Outreach of the International Criminal Court* (29 September 2006) ICC-ASP/5/12, para. 3.

20 UN Guidelines, paras 19 and 20.

21 ICTJ, *Through a New Lens: A Child-Sensitive Approach to Transitional Justice* (August 2011) 35.

22 CRC Committee, *General Comment No. 12 (2009): The right of the child to be heard* (20 July 2009) CRC/C/GC/12, para. 134.

economically disadvantaged or because they lack physical access to information networks".[23] In order to reach children, the ICC has to develop strategies that take into consideration the way in which children gather or receive information, which is usually, although not necessarily, through adults (*i.e.* their parents or their teachers), but also through social networks.

The ICC has recognised that specific strategies are needed for reaching and engaging with children.[24] The ICC Outreach Strategy has referred, in general, to how outreach should be tailored to specific audiences, bearing in mind their specific needs, beliefs, attitudes, opinions and cultural context.[25] For example, it has specified that information given by the ICC to local populations should be accurate but also simple and meaningful to a non-specialist audience.[26]

But how are these messages or information to be transmitted to children interacting with the ICC? The International Center for Transitional Justice has identified the following elements that should be taken into consideration when developing outreach strategies for children: a) children's best interests should be taken into account at all times, according to the different age groups (*i.e.* young children and youth); b) outreach efforts must be built upon a stable infrastructure supervised by adults that are close to the children (*i.e.* families and school teachers); c) children's organisations and agencies (*i.e.* UNICEF) should be consulted when developing outreach activities and materials.[27] For example, when the Prosecutor requests the authorisation to start an investigation and victims submit representations pursuant to Article 15 of the Rome Statute, outreach activities could be developed differentiating among children of different ethnic groups (particularly targeting a minority that could be excluded from general approaches), age (young children and youth) and gender (aiming at the girl-child who is often excluded). These outreach activities could be developed in schools with teachers and parents, so that children are protected from undue exploitation by other adults that may want to benefit from ICC proceedings. In cases dealing with former child soldiers, such activities could also be developed in demobilisation centres. Lastly, children's organisations in the field could become partners of ICC in developing these outreach activities, particularly as they could have knowledge of culture, language and other particularities in a given country or locality in order to

23 Patrick Vinck and Phuong Pham, 'Outreach Evaluation: the ICC in the Central African Republic' (2010) *International Journal of Transitional Justice*, 11.

24 ICC Assembly of States Parties, *Strategic Plan for Outreach of the International Criminal Court* (29 September 2006) ICC-ASP/5/12, para. 26.

25 ICC Assembly of States Parties, *Strategic Plan for Outreach of the International Criminal Court* (29 September 2006) ICC-ASP/5/12, para. 46.

26 ICC Assembly of States Parties, *Strategic Plan for Outreach of the International Criminal Court* (29 September 2006) ICC-ASP/5/12, para. 47.

27 ICTJ, *Making an impact: Guidelines on Designing and Implementing Outreach Programs for Transitional Justice* (January 2011) 26.

create tailor-made outreach activities that meet the needs of children in a given situation.

The ICC's Strategic Plan refers in general to "victims" and identifies means such as radio, booklets, posters, cartoons and training seminars to transmit information to them.[28] Regarding children and youth, the ICC identifies that a possible tool could be the establishment of agreements with child agencies and other child and youth groups. Means of communication that are identified are for example child-friendly flyers, debates and competitions in schools.[29] Most importantly, and as recommended by the International Center for Transitional Justice, materials should be culturally appropriate and written in a manner that facilitates understanding. For example, when designing material for children, experts should be consulted and the material should be tested with children in the field.[30]

In the ICC's first-ever trial, which involved child victims and witnesses, the PIDS developed an outreach strategy that included, among other activities, radio and television programmes but also meetings with the communities. For example, the PIDS planned a series of activities with demobilised children in order to follow the trial, explain the judicial proceedings and discuss their rights.[31] Prior to the commencement of the trial, the PIDS carried out several town hall meetings where the affected communities live, including meetings with students and children.[32]

Some outreach activities carried out to inform child victims of judicial proceedings before the ICC have been: drama performances or drama clubs,[33] school clubs and/or human rights clubs,[34] children/youth radio programmes ("children to talk to children"),[35] commemoration days (Day of the African Child) to teach children, parents and community about the prohibition of child recruitment,[36] and closed information sessions for women, their husbands and children.[37]

28 ICC Assembly of States Parties, *Strategic Plan for Outreach of the International Criminal Court* (29 September 2006) ICC-ASP/5/12, para. 52.

29 ICC Assembly of States Parties, *Strategic Plan for Outreach of the International Criminal Court* (29 September 2006) ICC-ASP/5/12, para. 56.

30 ICTJ, *Making an impact: Guidelines on Designing and Implementing Outreach Programs for Transitional Justice* (January 2011) 15.

31 ICC Outreach Unit, *Communication Strategy Trial of Thomas Lubanga* (The Hague, January 2009) <http://www.icc-cpi.int/NR/rdonlyres/F8CB60B0-731D-41DB-9705-B45E20F0BE66/279608/Outreach_SP_Lubanga_ENGpdf.pdf> 10, accessed 8 August 2013.

32 ICC Outreach Unit, *Communication Strategy Trial of Thomas Lubanga* (The Hague, January 2009) <http://www.icc-cpi.int/NR/rdonlyres/F8CB60B0-731D-41DB-9705-B45E20F0BE66/279608/Outreach_SP_Lubanga_ENGpdf.pdf> 10, accessed 8 August 2013.

33 ICC, PIDS, *Outreach Report 2010*, 11.

34 ICC, PIDS, *Outreach Report 2010*, 14.

35 ICC, PIDS, *Outreach Report 2010*.

36 ICC, PIDS, *Outreach Report 2010*.

37 ICC, PIDS, *Outreach Report 2010*, 44.

However, in the analysis carried out by Vinck and Pham of the ICC outreach programme in the Central African Republic, surveys showed that the persons who participate in ICC outreach meetings were on average young male adults, who had a higher level of education, were wealthier and had more access to the media than the general adult population.[38] Although the survey did not include reference to children, one could foresee that in comparison with the general population, children could even be more disadvantaged. The study recommends that outreach programmes be tailored to the needs and expectations of heterogeneous communities and target groups in unique contexts, especially those who are unlikely to be reached by traditional media.[39]

Overall, the following outreach material could be appropriate for child victims in cases before the ICC. These materials however, should be tested and their use and impact should be evaluated for each particular situation in which the ICC is involved: a) comics and graphic novels or other child-friendly information (including plays, radio programmes, etc.);[40] b) social network internet sites (for situations where youth could be expected to have internet access);[41] c) websites with a section dedicated to children, which could be used by NGOs or other intermediaries working directly with children or their legal representatives with downloadable and printable material;[42] d) radio programmes in which children ask questions about the ICC that may interest or affect them;[43] e) meetings and workshops in schools, demobilisation centres, displaced persons and refugee camps targeted at children and youth;[44] f) visits of school groups to the ICC premises in the headquarters or in the field (par-

38 Patrick Vinck and Phuong Pham, 'Outreach Evaluation: the ICC in the Central African Republic' (2010) *International Journal of Transitional Justice*, 17 and 19.

39 Patrick Vinck and Phuong Pham, 'Outreach Evaluation: the ICC in the Central African Republic' (2010) *International Journal of Transitional Justice*, 20-21.

40 ICTJ, *Making an impact: Guidelines on Designing and Implementing Outreach Programs for Transitional Justice* (January 2011) 15; Victims' Rights Working Group, *Establishing effective reparation procedures and principles in the ICC* (September 2011); ICTJ, *Through a New Lens: A Child-Sensitive Approach to Transitional Justice* (August 2011) 36.

41 ICC has a Facebook and Youtube accounts. <https://www.facebook.com/pages/International-Criminal-Court/106219979409522> and http://www.youtube.com/user/IntlCriminalCourt accessed 8 August 2013.

42 Redress, *Victims, Perpetrators or Heroes? Child Soldiers before the ICC* (September 2006) 34.

43 See for example Interactive Radio for Justice, which broadcasts radio talk shows in which community members in DRC and Central African Republic ask questions to ICC officials and other experts. See: ICTJ, *Making an impact: Guidelines on Designing and Implementing Outreach Programs for Transitional Justice* (January 2011) 17.

44 For example, in the ECCC, the outreach programme conducts workshops "Youth for Peace" targeting youth and teaching them about the tribunal. See Norman H Pentelovitch, 'Seeing Justice Done: The Important of Prioritizing Outreach Efforts at International Criminal Tribunals' (Spring 2008) *Georgetown Journal of International Law*, 472.

ticularly in Situation countries);[45] and g) train the trainer programmes targeting teachers or other adults who can teach children (particularly child victims in Situation countries) about the ICC.[46]

It is however important to understand the ICC's limitations, not only as regards its jurisdiction and mandate, but also its financial and human resources. The ICC cannot fulfil all the needs of outreach in its multiple situations around the African continent. In fact, it is to be expected that in the future the ICC could have situations in other continents, which would add challenges if a tailor-made approach would be adopted. In this regard, the partnerships between the ICC and key organisations and media in different regions of the world is essential so that affected communities learn about the ICC and the judicial proceedings concerning them. Importantly, it must be acknowledged that local civil society organisations can conduct outreach in a way that the ICC cannot, as they already have networks with local communities.[47]

It is important that the ICC benefits from child rights expertise of NGOs and international organisations already working in the field in countries where it has on-going situations and cases. However, the ICC also needs to have child-rights specialists, including in the Outreach Unit (persons who also understand the African-child context, for example in the current situations before the ICC).[48] Only if the ICC has in-house specialists will it be able to appropriately train its intermediaries and also monitor and organise the work carried out by them in the field. Moreover, it is also important for the ICC to have its own specialists in situations in which NGOs in the field may be unwilling or unable to cooperate with the ICC due to perceptions of impartiality or general security risks for their involvement with the ICC.

Moreover, the ICC should not delegate outreach in its entirety to civil society. Although NGOs are often well placed to conduct outreach activities, the ICC should not rely completely on external actors, particularly when

45 For example, in the SCSL, because of the geographical proximity between the ICC and the affected population, the ICC organised visits of school children and university students with question and answer sessions. This could be foreseeable if the ICC conducts hearings in situ in the future. See Norman H Pentelovitch, 'Seeing Justice Done: The Important of Prioritizing Outreach Efforts at International Criminal Tribunals' (Spring 2008) *Georgetown Journal of International Law*, 457.

46 In the ECCC in Cambodia, the outreach program, with several NGO's developed training programmes, for example for law students, who then travelled to provinces to teach villagers about the tribunal. Norman H Pentelovitch, 'Seeing Justice Done: The Important of Prioritizing Outreach Efforts at International Criminal Tribunals' (Spring 2008) *Georgetown Journal of International Law*, 471.

47 ICTJ, *Outreach Strategies in International Hybrid Courts: Report of the ICTJ-ECCC Workshop, Phnom Penh, March 3-5 2010* (Workshop Report 2010) 11.

48 For example, in the SCSL, the Outreach Section was originally composed of Sierra Leoneans. Norman H Pentelovitch, 'Seeing Justice Done: The Important of Prioritizing Outreach Efforts at International Criminal Tribunals' (Spring 2008) *Georgetown Journal of International Law*, 454.

security, safety and confidentiality of child victims and witnesses are at stake.[49] Reporting by NGOs or media may still be susceptible to polarization and misrepresentation and neither media nor NGOs can speak on behalf of the ICC.[50] Most importantly, although the ICC is bound by the principle of presumption of innocence and other considerations pertaining to the rights of the accused, local NGO's or other intermediaries in the field could act disregarding the right to a fair trial in ICC proceedings, and thus weaken the ICC's credibility as an impartial and fair court. In essence, as stated by Pentelovitch, international tribunals must work with and not through NGOs in carrying out outreach.[51]

5.3 Participation of Child Victims at the ICC

Article 68(3) of the Rome Statute is the core provision regarding victims' participation at the ICC. This provision states the following:

> '(…) 3. Where the personal interests of the victims are affected, the ICC shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the ICC and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. Such views and concerns may be presented by the legal representatives of the victims where the ICC considers it appropriate, in accordance with the RPE. (…)'

Although the RPE and the RoC further develop this notion of victims' participation, it has been mostly the ICC's practice and case law during its first years that has created a legal system that enables victims to present their views and concerns to the judges of the ICC, while safeguarding the rights of the accused to have a fair and impartial trial. This system is far from perfect and can certainly be improved and consolidated. Most regrettably, after ten years of practice the ICC has not adopted a court-wide approach to victims' participation and in fact Chambers' decisions in this regard are often contradictory. Thus, the ICC urgently needs to orchestrate a court-wide strategy on victims' participation, that reflects coordination among the organs of the ICC (including Chambers which have taken noticeably diverse approaches), but also

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49 ICTJ, *Making an impact: Guidelines on Designing and Implementing Outreach Programs for Transitional Justice* (January 2011) 29.

50 Lawyers Committee for Human Rights, *Effective Public Outreach for the International Criminal Court* (January 2004), available at <http://web.undp.org/comtoolkit/why-communicate/docs/Best%20Practices/EffectivePublicOutreachfortheInternationalCriminalCourt.pdf> accessed 8 August 2013.

51 Norman H Pentelovitch, 'Seeing Justice Done: The Important of Prioritizing Outreach Efforts at International Criminal Tribunals' (Spring 2008) *Georgetown Journal of International Law*, 446.

coordination with the State Parties (budget and political implications) as well as stakeholders in the field (NGOs, intermediaries, international organisations (including the UN) and victims' groups).

This section will analyse the existing legal framework of the ICC as regards victims' participation from a children's rights perspective, applying and interpreting ICC provisions in accordance with internationally recognised children's rights. It will study the developing ICC case law on the subject and will aim to provide recommendations on how this practice could be improved vis-à-vis child victims if a court-wide approach is to be adopted in the future.

5.3.1 Who is a victim?

Pursuant to Rule 85 of the RPE, victims in the ICC can either be: a) natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the ICC; or b) legal persons, which are understood as organisations or institutions that have sustained direct harm to any of their property. Thus, as noted in Chapter 4 above, the notion of victim will be dependent on the notion of the crime adopted by the ICC Chamber deciding on the victims' status.

As regards legal persons, Rule 85 of the RPE gives examples of such legal persons, and includes organisations or institutions dedicated to religion, education, art or science or charitable purposes and to their historic monuments, hospitals and other places and objects for humanitarian purposes. However, this list should not be read as a *numerus clausus*, and other legal persons not foreseen in it could still be given the status of victims if they have suffered direct harm. For example, a NGO that not necessarily works in charities or for humanitarian purposes (*i.e.* microcredit organisation or human rights organisation) could still be granted the status of victim if it suffered direct harm to its property. In regards to children, institutions used for children's and youth's recreation (such as playgrounds, sports halls) or day-care centres or other buildings dedicated and used by children, could also be included within the definition of "legal person" under Rule 85 of the RPE. However, pursuant to Rule 85(b) of the RPE, the applicant institution would need to prove that the property it owned suffered direct harm and that such property was dedicated to religion, education, art or science or other charitable purpose.[52]

Trial Chamber I of the ICC used Principle 8 of the UN Basic Principles as guidance to further define the concept of victim under Rule 85 of the RPE. In accordance with the UN Basic Principles, a victim is someone who suffers, either individually or collectively, directly or indirectly, from personal harm in a variety of different ways, such as physical or mental injury, emotional

52 Brianne McGonigle Leyh, *Procedural Justice? Victim Participation in International Criminal Proceedings*, Intersentia (2011), 242.

suffering, economic loss or substantial impairment of his or her fundamental rights.[53] Thus, the consequences of international crimes upon children studied in Chapter 1 are relevant to establish whether a child is a victim under the Rome Statute. In addition, it is important to note that only victims who are victims of crimes charged may participate in the trial proceedings. Thus, applicants need to demonstrate the link between the harm suffered and the crimes charged against the accused.[54]

It is also significant that while Rule 85 of the RPE states that legal persons should suffer direct harm, nothing is said regarding natural persons. Thus, it must be understood that natural persons can suffer both direct and indirect harm. This is of particular importance for children, because they could suffer indirect harm as a result of the direct harm suffered by their parents or other caretakers, given their dependency status vis-à-vis adults (*i.e.* the child of an adult victim of a crime that, as a result of the crime, has a permanent disability could indirectly suffer harm as a result of his/her parent's disability). Although in situations where the parent of the child dies as a result of the crime, the ICC case law has disregarded the possibility of relatives participating on behalf of that deceased victim,[55] it has been accepted that family members of deceased persons may apply to participate for the direct moral damage they suffered as a result of their relative's death.[56] Therefore, children whose parents have passed away as a result of a crime within the jurisdiction of the ICC may also participate in proceedings for the moral harm they suffered as a result of the death of their parents.

In practice, the Chambers of the ICC have required victims to prove: a) their identity; b) that they suffered harm; and c) that there is a causal link between the harm suffered and the crime within the jurisdiction of the ICC. The ICC

53 *Lubanga case* 'Decision on victims' participation' (18 January 2008) ICC-01/04-01/06-1119, paras 90-92; 'Judgment on the appeals of The Prosecutor and The Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008' (11 July 2008) ICC-01/04-01/06-1432, paras 31-39.

54 *Lubanga case* 'Judgment on the appeals of The Prosecutor and The Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008' (11 July 2008) ICC-01/04-01/06-1432, paras 62-64.

55 Situation in Darfur, Sudan (*Darfur situation)* 'Corrigendum to Decision on the Applications for Participation in the Proceedings of Applicants a/0011/06 to a/0015/06, a/0021/07, a/0023/07 to a/0033/07 and a/0035/07 to a/0038/07' (14 December 2007) ICC 02/05-111-Corr, para. 36; *DRC situation* 'Corrigendum to the "Decision on the Applications for Participation Filed in Connection with the Investigation in the Democratic Republic of the Congo by a/0004/06 to a/0009/06, a/0016/06 to a/0063/06, a/0071/06 to a/0080/06 and a/0105/06 to a/0110/06, a/0188/06, a/0128/06 to a/0162/06, a/0199/06, a/0203/06, a/0209/06, a/0214/06, a/0220/06 to a/0222/06, a/0224/06, a/0227/06 to a/0230/06, a/0234/06 to a/0236/06, a/0240/06, a/0225/06, a/0226/06, a/0231/06 to a/0233/06, a/0237/06 to a/0239/06 and a/0241/06 to a/0250/06"' (31 January 2008) ICC-01/04-423-Corr, paras 24-25.

56 *Katanga and Ngudgolo case* 'Grounds for the Decision on the 345 Applications for Participation in the Proceedings Submitted by Victims' (Public redacted version, 23 September 2009) ICC-01/04-01/07-1491-Red-tENG, paras 51-56.

has also established that victims must not prove these requirements "beyond reasonable doubt", but that lower thresholds such as inferences of fact, circumstantial evidence, or *prima facie* evidence, suffices.[57]

The ICC's first decision on victims' applications to participate in the Situation of Uganda required victims to prove their identity with an official identity document with photograph. However, the same decision concluded that in areas affected by armed conflict "it would be inappropriate to expect applicants to be able to provide proof of identity of the same type as would be required of individuals living in areas not experiencing the same types of difficulties".[58] Referring to children, this same initial decision requested the Registry of the ICC to submit a report indicating the age at which children in Uganda could receive an official identity document and also indicating whether it was possible to obtain in Uganda an official document establishing the link between a child and a parent or guardian.[59]

Throughout the years, and taken into consideration the difficulties experienced by most victims in the current Situation countries, case law of the ICC has become more flexible in regards to child victims and their identification, allowing other forms of identification (including non-official documents such as voting cards, student cards, birth certificates or ultimately, when no document is available, a statement signed by two witnesses).[60]

Regarding parents or guardians of children acting on their behalf, the ICC's first decisions rejected some applications on behalf of children or submitted directly by children themselves, because they did not include consent of their parents or legal guardian.[61] However, later Trial Chamber I in the *Lubanga case*, referring to the CRC, allowed children to act on their own (without parental consent) or to have adults act on their behalf even if they did not

57 *DRC Situation* 'Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6' (17 January 2006) ICC-01/04 101-tEN-Corr, paras 12 and 15; *Darfur situation* 'Corrigendum to Decision on the Applications for Participation in the Proceedings of Applicants a/0011/06 to a/0015/06, a/0021/07, a/0023/07 to a/0033/07 and a/0035/07 to a/0038/07' (14 December 2007) ICC 02/05-111-Corr; *Lubanga case* 'Decision on victims' participation' (18 January 2008) ICC-01/04-01/06-1119, para. 99.

58 *DRC Situation* 'Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6' (17 January 2006) ICC-01/04 101-tEN-Corr, paras 16-19.

59 *DRC Situation* 'Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6' (17 January 2006) ICC-01/04 101-tEN-Corr, para. 20.

60 *Lubanga case* 'Decision on victims' participation' (18 January 2008) ICC-01/04-01/06-1119, paras 87-88; *DRC situation* 'Decision on the Requests of the Legal Representative of Applicants on application process for victims' participation and legal representation' (20 August 2007) ICC-01/04-374, paras 13-15.

61 *DRC situation* 'Decision on the applications for participation filed in connection with the investigation in the Democratic Republic of Congo by Applicants a/0047/06 to a/0052/06, a/163/06 to a/0187/06, a/0221/06, a/0226/06, a/0231/06 to a/0233/06, a/0237/06 to a/0239/06, and a/0241 to a/0250/06' (3 July 2008) ICC-01/04-505, para. 31.

have an official document linking the adult to the child (either via family link or legal guardianship).

On that occasion the Trial Chamber stated the following:[62]

> 'The Chamber notes that the applicant has consented to someone else acting on his behalf. The question that arises is whether the applicant needs to establish that the person acting on his behalf is either a relative or legal guardian, in order to participate in the proceedings. Alternatively, is the Chamber entitled to act on the application that has been submitted "by a person" on the applicant's behalf, which indicates clearly that the victim wishes to participate in these proceedings.
>
> The Rome Statute framework is clear on this issue. There are no provisions establishing categories of people who alone are allowed to act for victims, whether the latter are adults or children. Rule 89(3) of the Rules simply states that "(a)n application ... may also be made by a person acting with the consent of the victim, or a person acting on behalf of a victim, in the case of a victim who is a child ....". It follows that the person acting on behalf of a victim does not have to be a relative or a legal guardian because, within the Rules, the "person acting" is undefined and unrestricted.
>
> In support of this approach, the inevitable experience of most, if not all, children who were recruited in the circumstances alleged in this trial, is that they will have been separated from their parents and other adult relatives at a relatively young age. Many of them have been living, to put it at its lowest, disjointed and very unsettled lives for a number of years. Some children have still not been reunited with their families and they do not have legal guardians. To the extent that they have managed to find representation at all, they are often assisted by people such as schoolteachers and other similar community figures.
>
> In this regard, the Chamber notes the General Comment No. 6 (2005) of the CRC Committee in which it was recognised that separated or unaccompanied children (defined as children who have been separated from both parents, other relatives or from any previous legal or customary primary caregiver), in some situations "have no access to proper and appropriate identification, registration, age assessment, documentation family tracing, guardianship systems or legal advice". The Committee further noted that "in large-scale crises, where it will be difficult to establish guardianship arrangements on an individual basis, the rights and best interests of separated children should be safeguarded and promoted by States and organisations working on behalf of these children".
>
> The Chamber has paid careful attention to the experience of the Registry in the field in the DRC, and particularly its opinion that "legal guardianship is very rare in Eastern Congo and many children who do not live with their parents, for instance because they have not yet been reunited with their families after being demobilised from an armed group or because they experience difficulties in reintegration, are looked after by persons such as school principals, transition

62 *Lubanga case* 'Annex A1 to the Order issuing public redacted annexes to the Decisions on the applications by victims to participate in the proceedings of 15 and 18 December 2008' (8 May 2009) ICC-01/04-01/06-1861-AnxA1, 59-60.

centres for demobilised children, who do not have a formal status in relation to the child".

The real possibility exists, therefore, that a number of applicants who seek to participate in these proceedings will be living in circumstances where they cannot be represented by their parents, other family relatives or a legal guardian. In relation to these victims, who are over 18 years of age or are close thereto, they have individually applied through a person acting on their behalf (who is not their next of-kin or their legal guardian) to participate in this trial as a victim. In each instance, the application accords with the express requirements of Rule 89 (3) of the Rules. All of the matters set out above provide strong support for the approach that the Rules have not restricted the types of people who are able to act on behalf of all victims and including child victims. (footnotes omitted).'

The importance of the aforesaid decision is that it recognises that children may submit an victim's application form to participate in ICC proceedings, regardless of any parental permission or control.[63] Since in the *Lubanga case* the children concerned had been separated from their parents for a long period of time in the context of an armed conflict and considering that these children were adolescents between 15 and 18 years old, the Chamber decided that these children could submit an application by themselves, without any parental control or decision.[64]

Trial Chamber II in the *Katanga and Ngudjolo case* similarly ruled that children could submit an application on their own. Likewise, it accepted that a statement signed by two credible witnesses could be used as proof of kinship or guardianship when an adult is acting on behalf of a child victim. However it concluded that this should be done on a case-by-case basis taking into consideration the child's maturity and capacity to make decisions.[65] This ICC decision is in fact in line with the CRC, since a child's maturity is not only age-related, but can also be drawn from the child's experience, environment and level of support.[66]

Nonetheless, in the *Bemba case*, Trial Chamber III distanced itself from the other two Trial Chambers and required proof of kinship and guardianship between the child victim and the person acting on his or her behalf. It has

63 In fact, the CRC Committee determined that the more the child knows, has experienced and understands, the more the parent or legal guardian, or other persons responsible for the child, will have to transform direction and guidance into "reminders and advice and later to an exchange on an equal footing". See: CRC Committee, *General Comment No. 12 (2009): The right of the child to be heard* (20 July 2009) CRC/C/GC/12, 84.

64 Drumbl praises this approach, stating that this is an "individuated, careful and considered approach to assessing the capacity of these children". See Mark Drumbl, *Reimagining Child Soldiers in international Law and Policy* (Oxford University Press 2012) 161.

65 *Katanga and Ngudgolo case* 'Motifs de la décision relative aux 345 demandes de participation de victimes à la procédure' (23 September 2009) ICC-01/04-01/07-1491-Red, para. 98.

66 CRC Committee, *General Comment No. 12 (2009): The right of the child to be heard* (20 July 2009) CRC/C/GC/12, para. 29.

therefore required that an adult submits the application form for participation on behalf of the child victim.[67] In the Kenya Situation cases, Trial Chamber V, when referring to child victims, has also required that, if possible, consent be provided by the child's parent or legal guardian. Thus, parental consent although recommendable, appears not to be compulsory and it appears that children could act on their own (that is without an adult acting on their behalf).[68]

Before the Pre-Trial Chambers case law has been more consistent, as proof of kinship between the child victim and the person acting on his or her behalf is necessary for a child to apply to participate in pre-trial proceedings. As proof of kinship, the Pre-Trial Chambers have required either official documents, such as a birth certificate or a letter from the local Council, as well as non-official documents, such as a birth notification card or a baptism card.[69] Thus, although the Pre-Trial Chambers have made proof of kinship compulsory, a flexible approach has been adopted as to the means to prove this relationship.

Case law at the ICC is far from homogenous regarding children's possibility to participate without parental consent, on their own or via an adult acting on their behalf (even if that adult is not related to them). From a children's rights perspective, and taking into consideration the CRC, the flexible standard adopted by Trial Chambers I and II that allowed child victims to participate in criminal proceedings should be preferred. This approach takes into consideration that parental consent or legal guardianship is sometimes impossible in situations of armed conflict or mass violations of human rights, in which children are very often orphaned or unaccompanied. Furthermore, this standard is also in line with Article 12 of the CRC and the Comments made by the CRC Committee in the sense that the capacity of the child to express his or her views should be presumed and it is not up to the child to prove this capacity.[70]

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67 'Decision defining the status of 54 victims who participated at the pre-trial stage, and inviting the parties' observations on applications for participation by 86 applicants' (22 February 2010) ICC-01/05 01/08-699 para. 36.

68 *Ruto and Sang case,* 'Decision on the protocol concerning the handling of confidential information and contacts of a party with witnesses whom the opposing party intends to call' (24 August 2012) ICC-01/09-01/11-449, Annex 1, para. 33

69 *Kony and others case* 'Decision on victims' applications for participation a/0010/06, a/0064/06 to a/0070/06,a/0081/06, a/0082/06, a/0084/06 to a/0089/06, a/0091/06 to a/0097/06, a/0099/06,a/0100/06, a/0102/06 to a/0104/06, a/0111/06, a/0113/06 to a/0117/06, a/0120/06,a/0121/06 and a/0123/06 to a/0127/06' (14 March 2008) ICC 02/04 01/05-282 para. 7; *Bemba case* 'Fourth Decision on Victims' Participation' (12 December 2008) ICC-01/05 01/08-320, para. 38; *DRC situation,* ICC-01/04-505, para. 31. See also *Gbabgo case* 'Second decision on issues related to the victims' application process' (05 April 2012) ICC-02/11-01/11-86, para. 36 and 'Decision on Victims' Participation and Victims' Common Legal Representation at the Confirmation of Charges Hearing and in the Related Proceedings' (4 June 2012) ICC-02/11-01/11-138, para. 26.

70 CRC Committee, *General Comment No. 12 (2009): The right of the child to be heard* (20 July 2009) CRC/C/GC/12, para. 20.

On the other hand, a very strict standard which compels the child to present parental or guardian consent or a proof of this consent, is contrary to this presumption, because it parts from the assumption that children are incapable and thus require consent of an adult to participate in ICC proceedings. Moreover, a blanket approach that treats all children alike or that sets limits of age to determine maturity should be avoided. This should preferably be determined on a case-by-case basis, taking into consideration the personal circumstances of that child.[71]

Nevertheless, safeguards must still be developed in order to verify that children have made an informed decision to participate before the ICC and that it is in the best interests of the child to participate in international criminal proceedings. For example, even though the ICC could preliminarily grant status to child victims acting on their own behalf, without parental consent, judges could instruct the Registry to carry a field visit in order to interview these children and check whether: a) they are separated or unaccompanied; b) they have taken an informed decision on their participation before the ICC; and c) their participation is not manifestly contrary to their best interests. This would guarantee that children have access to the ICC, but also avoid that third persons (such as intermediaries) take advantage of the child's situation in order to receive some kind of benefit for the child's participation in the ICC.[72] As determined by the CRC Committee, children must be able to freely express their view, which is without undue influence or pressure from others.[73] Likewise, adults, including the ICC judges and staff, must not unilaterally decide on the best interests of the child. This should be done in consultation with the child concerned and taking into consideration the child's unique context.[74]

Particular attention must be given in this regard to the CRC Committee General Comment on Article 12 of the CRC, which emphasises that the right to be heard is a choice of the child, and not an obligation.[75] Thus, the ICC should adopt measures to ensure that the child receives all necessary information and advice to make an informed decision in favour of his or her best interests (beyond the interests of his or her parents or guardians or even those

71 Beijer and Liefaard, 'A Bermuda Triangle? Balancing protection, participation and proof in criminal proceedings affecting child victims and witnesses' (2011) *Utrecht Law Review*, p. 70-106.

72 In recent developments before the ICC it has been alleged that intermediaries have induced child victims and witnesses to lie to the ICC in order to receive financial and other benefits. See *Lubanga case* 'Redacted Decision on intermediaries' (31 May 2010) ICC-01/04-01/06-2434-Red2.

73 CRC Committee, *General Comment No. 12 (2009): The right of the child to be heard* (20 July 2009) CRC/C/GC/12, para. 22.

74 CRC Committee, *General Comment No. 12 (2009): The right of the child to be heard* (20 July 2009) CRC/C/GC/12, para. 71.

75 CRC Committee, *General Comment No. 12 (2009): The right of the child to be heard* (20 July 2009) CRC/C/GC/12, para. 16.

of the prosecution or the ICC in general). In this last aspect, it is essential that the ICC provides adequate training in children's rights to those staff members and intermediaries assisting the victims in their application process. Although the work of intermediaries is essential for the functioning of the ICC in the field,[76] their benevolence could be detrimental to the child victim if his/her particular needs are not taken into consideration (*i.e.* re-victimisation) and safeguards are not adopted (*i.e.* protective or special measures under Rule 87 and 88 of the Rome Statute).

In order to reach more children and to facilitate that their decision to participate is an informed one and in their best interests, the ICC could produce an explanatory booklet aimed specifically to children or persons working with children (*i.e.* social workers, demobilisation centres staff, etc.). Although it is not required that the child has comprehensive knowledge of all aspects of what participation entails, the ICC should guarantee that children have sufficient understanding to be capable of making an informed decision.[77] This would allow not only for children to know their rights as victims before the ICC but also to inform adults working with children on how to present an application on behalf of a child. Although the ICC has an explanatory booklet to its standard application forms, it does not have group-specific booklets. Such specific booklets could be created to target groups of the population that ordinarily have less access to information (not only children, but also for example victims of sexual violence or specific minority or immigrant groups in a given situation) and that require differentiated treatment in light of their unique needs (pursuant to Rule 86 of the RPE).

Considering the rapid developmental changes of children, the application process should be expedited in general, but particularly when the application concerns crimes committed against children. A child who applies at age sixteen to participate in proceedings might not be interested in participating or might even be unreachable if the ICC contacts him or her three or four years later. Likewise, the interests of that victim might have also changed significantly and eventual reparations could even become moot with the passing of time.

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76 *DRC situation* 'Decision on the Applications for Participation Filed in Connection with the Investigation in the Democratic Republic of Congo by Applicants a/0189/06 to a/0198/06, a/0200/06 to a/0202/06, a/0204/06 to a/0208/06, a/0210/06 to a/0213/06, a/0215/06 to a/0218/06, a/0219/06, a/0223/06, a/0332/07, a/0334/07 to a/0337/07, a/0001/08, a/0030/08 and a/0031/08' (4 November 2008) ICC-01/04-545 para. 25; *Katanga and Ngudgolo case* 'Motifs de la décision relative aux 345 demandes de participation de victimes à la procédure' (23 September 2009) ICC-01/04-01/07-1491-Red, paras 42-43.

77 CRC Committee, *General Comment No. 12 (2009): The right of the child to be heard* (20 July 2009) CRC/C/GC/12, para. 21.

5.3.2 The application process

According to Rule 89 of the RPE, victims wishing to participate in ICC proceedings should present a written application to the ICC. During its first years, the ICC developed standard application forms which victims (or someone acting on their behalf) fill-in and present to the ICC. The practice during these first years was that the Registry, more specifically the VPRS, would receive the applications, prepare a report to the relevant Chamber and then transmit to the judges all the applications received as well as the report. Once the Chamber received the applications and the report, it would then instruct the Registry to transmit the application forms (either in full or redacted) to the parties in the proceedings and the parties would be granted the opportunity to submit observations on the victims' applications. The Chamber would finally issue a written decision determining on an individual basis which applicants met the requirements to participate as victims pursuant to Rule 85 of the RPE.[78]

This process proved to be manageable in the *Lubanga case*, considering that the number of victims participating in that first case was quite limited. In fact, only 3 victims were granted status to participate at the pre-trial stage of the proceedings and during the trial phase, 129 victims were granted status to participate in the proceedings.[79] However, in more recent cases before the ICC, thousands of applications have been received.[80]

The drawback to this increased victims' participation is that the Registry, parties and Chambers appear to have become overwhelmed by the individual-application system. In fact, victims' participation became at one moment torrential in the confirmation of charges of the *Mbarushimana case* and it was reported that hundreds of victims were not able to participate because the Registry had been unable to meet the deadline established by the Chamber to receive victims' applications.[81] Likewise, victims' interests may not be

78 *Lubanga case* 'Decision inviting the parties' observations on applications for participation' (6 May 2008) ICC-01/04-01/06-1308.

79 'Decision on the applications by victims to participate in the proceedings' (15 December 2008) ICC-01/04-01/06-1556-Corr; 'Decision on the applications by 3 victims to participate in the proceedings' (18 December 2008) ICC-01/04-01/06-1562; 'Decision on the applications by 7 victims to participate in the proceedings' (10 July 2009) ICC-01/04-01/06-2035; 'Decision on the applications by 15 victims to participate in the proceedings' (13 December 2010) ICC-01/04-01/06-2659-Corr-Red.

80 Wakabi Wairagala, 'Thousands more apply to join Bemba trial as victims' (*The Trial of Jean-Pierre Bemba Gombo: A project of Open Society Justice Initiative*, 30 September 2011) <http://www.bembatrial.org/2011/09/thousands-more-apply-to-join-bemba%e2%80%99s-trial-as-victims/> accessed 8 August 2013.

81 Hirondelle News Agency 'ICC/Mbarushimana – Registrar Flooded with Victims Requests' (*Hirondelle News*, 13 September 2009) <http://www.hirondellenews.com/icc/318-mbarushimana/25509-en-en-130911-iccmbarushimana-registrar-flooded-with-victims-requests1456014560> accessed 8 August 2013.

adequately represented if one or two legal representatives represent thousands of clients, who may very well have different and even opposing interests.

However, victims' participation is enshrined in the Rome Statute and cannot be "reconsidered" or become impracticable or symbolic. Nevertheless, the procedure and particularly the individual application process should be amended, in order to provide meaningful participation for victims, but also safeguarding the rights of the accused to a fair and expeditious trial. Therefore it is irrefutable that the original application process (used mainly in the *Lubanga case, Katanga and Ngudjolo case* and the *Bemba case*), which requires case-by-case evaluation by the Registry, the Chambers and the parties in the proceedings, needs to be revisited, particularly for cases in which a large amount of victims have allegedly suffered harm. Otherwise, the application procedure could become contrary to the principles of fair trial (both for the accused and for the victims themselves) since victims' participation should not overburden defence teams and, on the other hand, victims should be able to effectively participate in proceedings.

Judge Van Den Wyngaert of the ICC commented that the "individualised approach" may work in a national proceeding, but at the ICC it was becoming overwhelming and could become unsustainable. She also suggested that a collective approach should replace the individual system of victims' participation. Most importantly, this ICC judge concluded that victims' participation should not only be respectful of the rights of the accused, it should also be meaningful to the victims, who, within the individual application system, were represented by common legal representatives, mostly in a "symbolic" manner.[82]

Not surprisingly, Trial Chamber V in the two Kenya Situation cases (of which Judge van de Wyngaert was a member for over a year) decided to change the individual approach to victims' participation. In these two cases the judges concluded that victims wishing to participate in person in trial proceedings need to submit the individual victim's application form. However, for all other victims, the Registry was instructed to create a database or record requiring less detailed information. This general group of victims, who does not need to submit individual application forms, will remain anonymous to the parties. A common legal representative, who works closely with the OPCV, represents these victims' interests.[83]

This approach, which as Trial Chamber V stated is not a general ICC rule but case-specific, could be a viable form of victims' participation for other cases

82 Christine Van Den Wyngaert, Victims before International Criminal Courts: Some views and concerns of an ICC trial judge, *Case Western Reserve Journal of International Law*, Volume 44 (2012), p. 475 – 496.

83 *Kenyatta and Muthaura case* 'Decision on victims' representation and participation' (3 October 2012) ICC-01/09-02/11-498, para. 24.

with a large number of victims or in which victims have security concerns.[84] The criteria adopted by Trial Chamber V could also be beneficial for child victims, but only if they are properly included within the general group of victims to be represented by the common legal representative and the OPCV. In this regard, Trial Chamber V instructed that all victims, including the vulnerable ones, should be treated in a fair and consistent manner.[85] However, in order to fulfil this judicial instruction, outreach is essential so that victim's representation does not exclude certain groups of victims, including children, women and other usually unrepresented or underrepresented groups. Likewise, more resources should be allocated to the OPCV so that their involvement in the proceedings in Kenya does not reduce the OPCV's ability to support victims' in other cases, while at the same time providing legal support to the common legal representative in the Kenya situation cases. However, it is too soon to thoroughly evaluate the impact that this new collective approach will have in the Kenya situation cases.

A new approach that also distances itself from the individual victims' applications has been taken in the pre-trial phase of the *Gbagbo case*. In this case, the Single Judge instructed the Registry to explore the possibility to change the ICC's application process into a collective procedure.[86] Moreover, the Single Judge proposed a procedure that appears to guarantee effective participation of individual victims within a group. First of all, the Single Judge instructed that only Registry staff assist applicants in completing the collective form.[87] This direct involvement of the Registry could indeed reduce the risks of having to rely on intermediaries, which as seen in the *Lubanga case*, may be prejudicial to a fair trial.[88] Furthermore, the fact that the Registry is involved at this early stage may also act as "quality control" so that the applications that reach the Chamber are only those that are complete and in accordance with the ICC provisions. Importantly, the Single Judge foresaw that some "sensitive categories of victims" might not be represented in collective applications.[89] Though the Single Judge referred exclusively to victims of sexual violence, children could also be included in these special categories that should not be excluded when collective applications are submitted.

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84 *Kenyatta and Muthaura case* 'Decision on victims' representation and participation' (3 October 2012) ICC-01/09-02/11-498, para. 23.

85 *Kenyatta and Muthaura case* 'Decision on victims' representation and participation' (3 October 2012) ICC-01/09-02/11-498, para. 31.

86 *Gbagbo case* 'Organisation of the Participation of Victims' (6 February 2012) ICC02/1101/11-29-Red.

87 *Gbabgo case* 'Second decision on issues related to the victims' application process' (05 April 2012) ICC-02/11-01/11-86, para. 27.

88 *Lubanga case* 'Judgment pursuant to Article 74 of the Rome Statute' (14 March 2012) ICC-01/04-01/06-2842, para. 482.

89 *Gbabgo case* 'Second decision on issues related to the victims' application process' (05 April 2012) ICC-02/11-01/11-86, para. 29.

Recently in the Pre-Trial proceedings in the *Ntaganda case*, the Single Judge in that case followed the precedent of the *Gbagbo case*, albeit with some caveats. The Single Judge adopted again the case-by-case approach, in which each application will be evaluated individually. However, the Single Judge ordered the Registry to group the applications in order to make their assessment more effective. Moreover, the Single Judge created a 1-page application form, containing such basic information that it will most possibly repeat and rarely identify the specific situation of individuals and most likely identify a "pattern" of crimes committed and harms suffered by groups of persons in specific locations.[90]

It seems that most of the recent ICC case law reflects a shift from individual application forms to a more collective approach. At least, the thorough and highly individualised applications forms of the first ICC cases seem to have been abandoned. In fact, it is not anticipated that judges in future ICC cases will go back to the approach adopted in the ICC's first trials, particularly considering that it is resource intensive and thus has budgetary implications, not only for the ICC as an institution, but also for overburdened defence teams. This new collective approach or the recently adopted approach in the *Ntaganda case* should be welcomed, particularly since it simplifies the sometimes cumbersome and complicated individual application forms. However, the fact that one or two legal representatives represent the views of often thousands of clients is not tackled by these new "collective" or "group" approaches. Moreover, there is a patent risk that children, as a vulnerable group, may be excluded from the general interests of the "group". Moreover, although the OPCV has been granted a protagonist role in this new participation system, its role needs to be coupled with more resources. Otherwise, these new collective or group approaches could also become "symbolic" rather than real and meaningful for individual victims.

Furthermore, in spite of its clear effectiveness, this new collective approach could be of questionable legality. Although Article 68(3) of the Rome Statute is general and thus permissible of this type of collective approach, Rule 89 of the RPE and Regulation 86 of the RoC reflect a different intention from their drafters, which clearly foresees an individual application process. Although this individual application process may seem obsolete in most current ICC cases and burdensome for the parties, participants, Chambers and the ICC's budget, amendments to the relevant provisions, and not case law, should ultimately change the individual application approach. Consequently, a reform to Rule 89 of the RPE and Regulation 86 of the RoC would be most appropriate, not only to adapt the ICC's legal framework to the reality of its situations and cases, but also in order to harmonise the current conflicting case law between ICC Chambers in different cases.

90 'Decision Establishing Principles on Victims' Application Process', 28 May 2013, ICC-01/04-02/06-67.

5.3.3 Legal Representation and Legal Aid

Pursuant to Article 68(3) of the Rome Statute, victims have the right to present their views and concerns to the ICC, and this can be done either via direct participation or via a legal representative. For practical reasons, and certainly considering the rights of the accused to a fair and expeditious trial, the majority of victims who have participated in court proceedings thus far have not addressed judges in person, but through common legal representatives. Regardless of whether a collective or individual victims application process is adopted, the practice of assigning a common legal representative to a group of victims should remain in practice. However, as noted above, the views of individual victims should not dissolve within the general interests of "the group"" or much less, become unrepresented in light of the legal representative's own views.[91]

In this sense, it is important to separate victims into different groups of common legal representatives when their interests may be conflicting or when victims of a certain group may have specific needs. In the *Lubanga case*, for example, victims were assigned to two groups of common legal representatives and a limited group of victims (those with dual status of victims and prosecution witnesses) were assigned to the OPCV.[92] In *the Katanga and Ngudjolo case*, victims were grouped into two categories, given potential conflicts of interests. One category of victims were the former child soldier victims and the other the victims of other crimes.[93] In the *Bemba* trial, victims were assigned to two groups according to the geographical location of the crimes.[94]

As noted by the Women's Initiative for Gender Justice, dividing victims into groups based on grounds such as geographical location, although effective for some purposes (particularly access to the victims by the legal representative), could also ignore that victims within that same geographical location may have distinct interests.[95] In fact, by dividing the victims based on geographical

91 See for example: *Ruto and Sang case* 'Common Legal Representative for Victims' Observations in Relation to the "Joint Defence Application for Change of Place Where the Court Shall Sit for Trial' (22 February 2013) ICC-01/09-01/11-620, paras 13-29. In this submission the common legal representative stated that although victims opposed an *in situ* trial in Kenya or Tanzania, he gave his personal view supporting an *in situ* trial.

92 *Lubanga case* 'Judgment pursuant to Article 74 of the Rome Statute' (14 March 2012) ICC-01/04-01/06-2842, para. 20.

93 'Order on the organisation of common legal representation of victims' (22 July 2009) ICC-01/04-01/07-1328.

94 'Decision on common legal representation of victims for the purpose of trial' (10 November 2010) ICC-01/05 01/08-1005. As of February 2011, approximately 858 victims were represented by one legal representative and 451 victims by another one. See: Women's Initiatives for Gender Justice (WIGJ), *Legal Eye on the ICC,* <http://www.iccwomen.org/news/docs/LegalEye_Mar11/index.html.> accessed 8 August 2013.

95 Women's Initiatives for Gender Justice (WIGJ), *Legal Eye on the ICC,* <http://www.iccwomen.org/news/docs/LegalEye_Mar11/index.html.> accessed 8 August 2013.

aspects, particular interests, such as those of child victims, could be neglected. Thus, victims should be grouped taking into consideration not only geographical location, but also grounds such as those included in Article 21(3) of the Rome Statute: age, gender, race, religion, ethnic or social status, etc. Doing otherwise could lead to the discrimination of certain groups of victims within the "general group" represented by a common legal representative. Moreover, preferably, the common legal representative should have some kind of expertise in dealing with victims of a certain group, particularly those included in Rule 86 of the RPE.

Thus, in future cases, it would be appropriate to assign child victims and adult victims distinct common legal representatives. Although not compulsory in the requirements to be included in the list of counsel, it would be appropriate to take into account experience with children and their rights when a lawyer is to be assigned to a group of child victims. This is necessary because a legal representative working with children has a client-lawyer relation that is particular, since the lawyer must not only follow the instructions of his or her client, but also take into consideration that in following such instructions, the child's best interests and overall well-being must be taken into consideration. However, the child's legal representative must not act as a guardian *ad litem*. This is in essence a different role that, if necessary, should be fulfilled by another person assigned by the Court for that particular purpose.

Another key player in the representation of victims before the ICC is the OPCV. In the ICC's first cases, judges instructed the OPCV to act on behalf of unrepresented victims during the application process (prior to their status being granted). The OPCV also assisted legal representatives by providing legal advice and research for their respective submissions before the Chambers. The OPCV also worked along with other sections of the ICC, namely the VWU and the VPRS, in their work in the field in the various situation countries.[96]

More recently, as mentioned above, the OPCV has also been assigned as common legal representative of victims participating in the confirmation of charges hearing in the *Gbagbo case*.[97] It is important to note that in this case, the Single Judge instructed that the OPCV should be assisted by a team member with wide knowledge of the context and based in Cote d'Ivoire.[98] Likewise, the Pre-Trial Chamber in the *Ntaganda case* has also given a more prominent

96 ICC, Office of Public Counsel for Victims (OPCV), *Representing Victims before the ICC: A Manual for legal representatives* (December 2010) 34, available at <http://www.icc-cpi.int/NR/rdonlyres/01A26724-F32B-4BE4-8B02-A65D6151E4AD/282846/LRBookletEng.pdf>accessed 8 August 2013.

97 *Gbagbo case,* 'Decision on Victims' Participation and Victims' Common Legal Representation at the Confirmation of Charges Hearing and in the Related Proceedings' (4 June 2012) ICC-02/11-01/11-138, para. 42-43.

98 'Decision on Victims' Participation and Victims' Common Legal Representation at the Confirmation of Charges Hearing and in the Related Proceedings' (4 June 2012) ICC-02/11-01/11-138, para. 44.

role to the OPCV.[99] A similar approach has also been taken in the two Kenya Situation cases, in which Trial Chamber V decided that the common legal representative of victims should be based in Kenya and the OPCV would attend hearings in representation of the victims and their common legal representative.[100]

Although it is too soon to evaluate the results of this new approach assigning more duties to the OPCV, it appears to be favourable to victims, as it combines legal expertise based in The Hague (the OPCV) with local expertise and direct contact with victims in their own language and culture (field team member or common legal representative). However, unless the OPCV is strengthened with more staff and more resources, their assistance to the legal representatives or directly to victims could become a mere allegory.

Moreover, the possibility for victims to participate in person and individually in court should also remain viable, although taking into consideration the appropriateness of this participation in person and the rights of the accused. This possibility was put in practice in the first two trials before the ICC, in which victims requested leave and were granted the opportunity to testify under oath in trial.[101] In the *Bemba case*, victims were also granted the opportunity to request leave to present their views and concerns in person, not via sworn testimony as in the previous trials, but simply as victims giving an unsworn statement.[102] Taking into consideration the appropriateness of

99 *Ntaganda case* 'Decision Establishing Principles on Victims' Application Process', 28 May 2013, ICC-01/04-02/06-67.

100 *Kenyatta and Muthaura case* 'Decision on victims' representation and participation' (3 October 2012) ICC-01/09-02/11-498, para. 59.

101 However, they did not address the ICC as victims, presenting their "interests and concerns", but as witnesses. In these two trials, victims were subject to examination and cross-examination and did not necessarily express their "views and concerns", pursuant to Article 68(3) of the Rome Statute. See: *Lubanga case* 'Decision on the request by victims a/ 0225/06, a/ 0229/06 and a/0270/07 to express their views and concerns in person and to present evidence during the trial'(26 June 2011) ICC-01/04-01/06-2032-Anx; *Katanga and Ngudjolo case* 'Décision aux fins d'autorisation de comparition des victimes a/0381/09, a/0018/09, a/0191/08 et pan/0363/09 agissant au nom de a/0363/09'(9 November 2010) ICC-01/04-01/07-2517.

102 One representative requested leave for one of his clients to "express his/her views and concerns" via an unsworn statement. The legal representatives of other victims requested leave to call their clients to testify as witnesses and thus to give evidence under oath. They also requested leave to introduce, as evidence, written statements derived from interviews by the parties to their clients. One of the legal representatives submitted that these victims could give evidence on crimes committed in other areas of the Central African Republic referred to in the charges but not covered by the witnesses brought by the prosecution. See: *Bemba case* 'Order regarding applications by victims to present their views and concerns or to present evidence' (21 November 2011) ICC-01/05-01/08-1935; 'Application by the Legal Representative of Victims for leave to call victims to appear as witnesses and present their views and concerns to the Chamber' (6 December 2011) ICC-01/05-01/08-1990-tENG, paras 3-4; 'Requete afin d'autorisation de presentation d'éléments de preuves et subsidiairement de presentation de vues et preoccupations par les victims' (6 December 2011) ICC-01/

these requests, and particularly the expeditiousness of proceedings and the rights of the accused,[103] the Chamber authorised two victims to present evidence as witnesses and three victims to express their views and concerns in person.[104]

However, the real impact of the direct participation of victims in trial proceedings is yet to be seen. Victims who participated in the *Lubanga case* trial were deemed unreliable by the Chamber and in fact were referred to the Prosecutor as they possibly could have committed false testimony.[105] Moreover, in the *Ngudjolo case*, the accused was acquitted as a result of lack of evidence, including unreliable witnesses.[106] Thus, it will be in the judgments of the *Katanga case* and the *Bemba case*, as well as the upcoming Kenya cases, in which the impact of victims' participation in person might be evaluated.

Regardless of whether counsel representing victims is a common legal representative or counsel is attached to the OPCV, it is important that they are trained in children's rights, particularly if there are child victims within the group they are instructed to represent. The CRC Committee has stressed that in order for children's views to be transmitted correctly to the judges, legal representatives must have sufficient knowledge and understanding of the various aspects of the judicial proceedings, but also have experience in working with children.[107] The legal representative must thus be aware that he or she exclusively represents the interests of the child or children he or she represents, and not the interests of others (*i.e.* an NGO, the ICC or even the child's parents or guardians). In fact, the Code of Conduct of Counsel already contains a provision that states that in his or her relations with the client, counsel shall

05 01/08-1989-Conf (as referred to in 'Second order regarding the applications of the legal representatives of victims to present evidence and their views and concerns of victims the public decision of the Chamber' (21 December 2011) ICC-01/05 01/08-2027).

103 *Bemba case*, 'Second order regarding the applications of the legal representatives of victims to present evidence and their views and concerns of victims the public decision of the Chamber' (21 December 2011) ICC-01/05 01/08-2027), paras 10-19; 'Decision on the supplemented applications by the legal representatives of victims to present evidence and the views and concerns of victims'(23 February 2012) ICC-01/05-01/08-2138, paras 5, 21-23.

104 The Chamber authorised victims to testify if the harm suffered and their testimony would be representative of a larger number of victims. See: *Bemba case*, ICC-01/05-01/08-2138, paras 37-39, 55. See also: *Bemba case* 'Partly Dissenting Opinion of Judge Sylvia Steiner on the Decision on the supplemented applications by the legal representatives of victims to present evidence and the views and concerns of victims, ICC-01/05-01/08-2138' (13 May 2008) ICC-01/05-01/08-2140, paras 10-11.

105 *Lubanga case* 'Judgment pursuant to Article 74 of the Rome Statute' (14 March 2012) ICC-01/04-01/06-2842.

106 *Ngudjolo case*, Jugement rendu en application de l'article 74 du Statut, 18 December 2012, ICC-01/04-02/12-3.

107 CRC Committee, *General Comment No. 12 (2009): The right of the child to be heard* (20 July 2009) CRC/C/GC/12, paras 35-37.

take into account the client's personal circumstances, particularly when the client is a child.[108]

The Guidelines of the Committee of Ministers of the Council of Europe on child friendly justice have recommended that legal counsel to child victims should be trained and be knowledgeable on children's rights and related issues. Most importantly, the Council of Europe emphasised that children are fully-fledge clients, with their own rights, and that lawyers should bring forth the opinion of the child. Furthermore, in cases where conflicts of interest exist between the child and the parents, a guardian *ad litem* could be appointed.[109] As noted before, it is important to distinguish the figure of a legal representative from that of a guardian *ad litem*. The legal representative is the attorney or legal agent of the child who should represent the views of his or her client, even if these are in conflict with the views of the child's parents or guardians or even with his or her "best interests". In this sense, the figure of the legal representative recognises the child as a client, capable to instruct counsel in legal proceedings. On the other hand, the guardian *ad litem* is of a contrary nature, as it does not recognise the child as a capable party, and in fact is someone (usually also a lawyer) who is appointed to act on behalf the "incompetent" child and thus protect and foresee that his/her best interests are protected and safeguarded throughout the judicial proceedings.[110] As noted above, the ICC also has the possibility to appoint a child-support person during his/her interaction with the ICC. This support person may be an ICC staff member, but may also be someone that the child trusts, such as a mentor, guardian or adult family member.

Training of counsel is a key issue. Only if they are properly trained they will be able to address the interests of their clients, and particular groups within those victims, such as children or, as in the *Bemba case*, victims of sexual violence. Another crucial aspect regarding victims' representation is feedback and communication between victims (clients) and legal representatives (their lawyers). In more recent cases, teams of victims' legal representatives have also been assigned field staff that work in the country where the victims are and thus can be in more direct contact with them. For example, in preparation for the trial in the case of the *Prosecutor v. Banda and Jerbo*, the Registry has proposed that the teams of common legal representatives be comprised of two counsel and a case manager, but also legal consultants or field assistants, who may assist the counsel in "maintaining communication with victims who are located in the different countries" and who preferably "have an established

108 ICC Assembly of States Parties, *Code of Professional Conduct for Counsel* (Adopted on 2 December 2005) ICC-ASP/4/Res.1, Article 9 para. 2.

109 Council of Europe: Committee of Ministers, *Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice* (17 November 2010).

110 The Black's Law Dictionary defines "guardian *ad litem*" as a guardian appointed by the court to appear in a lawsuit on behalf of an incompetent or minor party. Black's Law Dictionary (7th Ed 1999).

relationship with the victims in question or have a background in outreach or victim support".[111] This in fact is essential in order to preserve the client-lawyer communication that is necessary to adequately represent the views and concerns of individual victims, be it 3 victims (as was the case in the pre-trial of *Lubanga case*) or thousands of victims (as is the current case in the trial of *Bemba case*).

If there are child victims, it is needless to say that field staff working with legal representatives must have training on children's rights and particularly on how to identify the best interests of these child victims and preserve their well-being and avoid re-victimisation during their participation, particularly in light of Rule 86 of the RPE. However, if a conflict of interest should arise between the child-client instructions and his or her best interests, ICC judges could appoint a guardian *ad litem* or a similar figure. A field officer with close relationship to the child could be in the best position to detect such conflicts of interests and inform an ICC-appointed legal representative, a guardian *ad litem* or a child support person, as well as the judges, without delay.

5.3.4 Modalities of participation

As noted above, victims may participate in person in ICC proceedings. However, this is only one possible aspect of their participation in ICC proceedings, pursuant to Article 68(3), insofar as this participation is appropriate and not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. Although victims participate in domestic criminal proceedings in many jurisdictions, victims' participation in the ICC is unique, since international crimes and thus proceedings to judge them have special features that must be considered when deciding upon the appropriate modalities of victim participation.[112] Moreover, modalities of victims' participation will also depend on the stage of the proceedings. Thus, while victims' participation may be limited in the initial investigation stages, their participation should reach its peak in reparations proceedings.

5.3.4.1 Pre-Trial Stage – Investigation

Proceedings at the ICC initiate differently, according to the triggering mechanism of the ICC's jurisdiction. When a State or the UNSC refers a situation to the ICC (pursuant to Article 13(a) and (b) of the Rome Statute), victims' parti-

111 Prosecutor v Banda and Jerbo 'Proposal for the common legal representation of victims' (25 August 2011) ICC-02/05-03/09-203.

112 Anne-Marie De Brouwer and Mikaela Heikkila, in: Goran Sluiter and others (eds), *International Criminal Procedure, Principles and Rules* (Oxford University Press 2013) 1341.

cipation at the pre-trial stage is minimal insofar as there is not a concrete case against an accused.

In the first investigations before the ICC, Pre-Trial Chamber I originally determined that victims were "an independent voice" vis-à-vis the Prosecutor in the investigation stage and that their participation was warranted at this early stage given that "the outcome of the criminal proceedings is of decisive importance for obtaining reparations for harms suffered".[113] However, this initial jurisprudence of the ICC was halted by the Appeals Chamber determination that victims' interests cannot be affected "in general" at the investigation stage. The Appeals Chamber reversed the Pre-Trial Chamber's decision authorising victims to participate in the pre-trial proceedings of the "DRC Situation" which determined that "the personal interests of victims are affected in general at the investigation stage, because the participation of victims at this stage can serve to clarify the facts, to punish perpetrators of crimes and to request reparations for the damage suffered". The Pre-Trial Chamber had concluded that victims' participation at this early stage was important because "it is at this stage that persons allegedly responsible for the crimes from which they suffered must be identified as a first step towards their indictment".[114] The Appeals Chamber was not convinced by this reasoning, and determined that the Pre-Trial Chamber "cannot grant the procedural status of victim entailing a general right to participate in the investigation", as this early stage cannot be seen as "judicial proceedings" affecting the interests of victims.[115]

Although the Appeals Chamber did envisage other instances in which victims could participate in pre-trial judicial proceedings prior to an arrest warrant against a particular individual, its decision in fact limited almost all possibilities of intervention by victims regarding the prosecution's investigation once a situation is referred by a State Party or the UNSC, but before a warrant of arrest or summons to appear is issued. In fact, the Appeals Chamber has ruled that, contrary to what had been established by the Pre-Trial Chamber,

113 *DRC Situation* 'Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6' (17 January 2006) ICC-01/04 101-tEN-Corr, paras 51-52.

114 *DRC situation* 'Corrigendum to the "Decision on the Applications for Participation Filed in Connection with the Investigation in the Democratic Republic of the Congo by a/0004/06 to a/0009/06, a/0016/06 to a/0063/06, a/0071/06 to a/0080/06 and a/0105/06 to a/0110/06, a/0188/06, a/0128/06 to a/0162/06, a/0199/06, a/0203/06, a/0209/06, a/0214/06, a/0220/06 to a/0222/06, a/0224/06, a/0227/06 to a/0230/06, a/0234/06 to a/0236/06, a/0240/06, a/0225/06, a/0226/06, a/0231/06 to a/0233/06, a/0237/06 to a/0239/06 and a/0241/06 to a/0250/06"' (31 January 2008) ICC-01/04-423-Corr, paras 63 and 72.

115 *DRC situation* 'Judgment on victim participation in the investigation stage of the proceedings in the appeal of the OPCD against the decision of Pre-Trial Chamber I of 7 December 2007 and in the appeals of the OPCD and the Prosecutor against the decision of Pre-Trial Chamber I of 24 December 2007' (19 December 2008) ICC-01/04-556, paras 45, 46 and 57.

the investigation is to be carried out *exclusively* by the Prosecutor.[116] Although victims' participation at this early stage could have had an impact on some of the early situations referred to by State Parties to the ICC, which have been appraised as one-sided or as targeting specific anti-government groups,[117] this possibility was halted at an early stage in the ICC history.

Notwithstanding the above, a very different situation occurs when the Prosecutor, using its *proprio motu* powers, decides to open an investigation in a particular State or Situation under Article 15 of the Rome Statute. In this particular instance, the Rome Statute clearly foresees victims' representations, which can be made to the Pre-Trial Chamber. In fact, in order to receive such representations, the Prosecutor has the obligation to inform victims of his intention to request authorisation to investigate under Article 15 of the Rome Statute, either directly to those victims known to him or her or the VWU or by general means (*i.e.* press release). In practice, the ICC Prosecutor has issued general announcements inviting victims to make representations under Article 15(3) of the Rome Statute. The approach taken by the Pre-Trial Chambers, however, has been somewhat different.

Pre-Trial Chamber II in the Kenya Situation instructed the Registry, particularly the VPRS to: (1) identify, to the extent possible, the community leaders of the affected groups to act on behalf of those victims who may wish to make representations (collective representation); (2) receive victims' representations (collective and/or individual); (3) conduct an assessment, in accordance with paragraph 8 of this order, whether the conditions set out in rule 85 of the Rules have been met; and (4) summarize victims' representations into one consolidated report with the original representations annexed thereto.[118] Meanwhile, in the Côte d'Ivoire Situation, Pre-Trial Chamber III did not instruct the Registry to identify victims' or victims' groups, but instead relied on the general notice given by the Prosecutor and ordered that any representation received was to be transmitted to the Registry. The Registry was then ordered

116 *DRC situation* 'Judgment on victim participation in the investigation stage of the proceedings in the appeal of the OPCD against the decision of Pre-Trial Chamber I of 7 December 2007 and in the appeals of the OPCD and the Prosecutor against the decision of Pre-Trial Chamber I of 24 December 2007' (19 December 2008) ICC-01/04-556, paras 48-51.

117 See for example: Hakan Friman, 'The International Criminal Court: Investigations into crimes committed in the DRC and Uganda, What is next?'(2004) *African Security Review.* See also: Ivana Sekularac, 'Gbagbo faces charges of crimes against humanity – ICC' *Reuters* (The Hague, 30 November 2011) <http://in.reuters.com/Article/2011/11/30/ivorycoast-gbagbo-idINDEE7AT07V20111130> accessed 8 August 2013; Mark Kersten, 'The ICC's Next Top Prosecutor: the Candidates' (*Justice in Conflict*, 3 June 2011) <http://justiceinconflict.org/2011/06/03/the-iccs-next-top-prosecutor-the-candidates> accessed 8 August 2013.

118 *Kenya situation* 'Order to the Victims Participation and Reparations Section Concerning Victims' Representations Pursuant to Article 15(3) of the Rome Statute' (10 December 2009) ICC-01/09-4.

to summarise the representations into a report.[119] Notwithstanding the procedural differences between the two pre-trial chambers, victims' representations were effectively received in both situations and were taken into consideration by both pre-trial chambers when determining whether to authorise an investigation. However, an approach such as that one taken in Kenya could be more beneficial for child victims, as they might not be informed properly about the possibility to make Article 15 representations, unless information is specifically targeted to them as a group. Thus, relying solely on the "general means", may leave out certain groups of victims (including among them children) that simply do not have access to the general means of information (*i.e.* newspapers, radio or internet).

What is interesting about the procedure of Article 15(3) of the Rome Statute is that victims do not need to submit an application for participation but can simply send their representations directly to the ICC, either by postal mail, e-mail or even submitted in person at the seat in The Hague. Moreover, they can act in a completely anonymous manner or send information on behalf of a "group" (*i.e.* victims of torture) and not on behalf of individuals that could be subject to retaliation. These representations also vary in format, size and contents, and thus are not subject to requirements such as those established by ICC Chambers (*i.e.* identification documents). For example, the ICC has received representations in the form of standard application forms seeking participation, but also audio-video material documenting crimes allegedly committed in a given situation.[120]

Most importantly, in both situations in which victims' representations have been submitted, the Pre-Trial Chambers have taken into consideration the information contained therein to establish if the criteria to authorise an investigation under Article 15 of the Rome Statute were met. For example, victims representations contained information related to crimes allegedly committed, the contextual elements of the crimes (such as the existence of an armed conflict or the wide or systematic nature of an attack). Most importantly, victims' representations also contained information on the victims' interests in the involvement of the ICC in a given situation.[121] This of course is possible considering the lowest evidentiary threshold required to open an investigation, which certainly would not be possible to establish the individual criminal responsibility under Article 74 of the Rome Statute. Thus, it seems that for many victims (who may not wish to participate directly in proceedings or who

119 Situation in the Republic of Cote d'Ivoire (*Cote d'Ivoire Situation)*, 'Order to the Victims Participation and Reparations Section Concerning Victims' Representations Pursuant to Article 15(3) of the Rome Statute' (6 July 2011) ICC-02/11-6, 6.

120 *Côte d'Ivoire situation* 'Report on Victims' Representations' (30 August 2011) ICC 02/11-11-Red.

121 *Côte d'Ivoire situation* 'Report on Victims' Representations' (30 August 2011) ICC 02/11-11-Red; *Kenya situation* 'Public Redacted Version of Report Concerning Victims' Representations (ICC-01/09-6-Conf-Exp) and annexes 2 to 10' (29 March 2010) ICC-01/09-6-Red.

may fear retaliation and thus wish to remain anonymous) representations under Article 15(3) is the most appropriate means of participation.

One of the major challenges of victims' representations is the access that victims have to this procedure. In Kenya, the Registry was instructed to carry out field missions to inform victims about their rights and collect their views.[122] The Registry noted that in that country victims have limited access to media and communications technology and that the OTP general notice was inaccessible to most victims and was well-understood by very few persons in the country.[123] In fact, in both the Kenya and Côte d'Ivoire situations, victims' representations received were in their majority from persons in their middle age and predominantly men. Likewise some ethnicities or geographical areas were more predominant than others.[124] In the Kenya Situation, the Registry noted that, despite efforts made by the VPRS to include as many women as possible, "this was not always easy to achieve". In reference to children, the Registry contented itself with regretting "that it was not ultimately able to identify appropriate representatives to specifically speak on behalf of victims who are children or young people" and their views were consequently "not visible in this process".[125]

Thus, it is clear that ICC practice has not included children in Article 15 proceedings and consequently children are among those who have been excluded, despite field visits and other outreach activities carried out by the Registry. In fact, in the decision authorising the investigation in Cote d'Ivoire, the Pre-Trial Chamber instructed the Registry to carry out general information campaigns paying particular attention to the needs of groups of victims, including children, women, victims of sexual violence and different ethnic groups. The Chamber also instructed the Registry to report to the Chamber if a group of victims or crimes had not been properly included or reflected

122 *Kenya situation* 'Order to the Victims Participation and Reparations Section Concerning Victims' Representations Pursuant to Article 15(3) of the Rome Statute' (10 December 2009) ICC-01/09-4.

123 *Kenya situation* 'Public Redacted Version of Report Concerning Victims' Representations (ICC-01/09-6-Conf-Exp) and annexes 2 to 10' (29 March 2010) ICC-01/09-6-Red, paras 32 and 35.

124 In the Kenya Situation, there were no victims' representations of children, the youngest being that of a 19-year old person. The average age of the persons who made individual representations was 44 years. Sixty per cent of the victims were men, see 'Public Redacted Version Of Corrigendum to the Report on Victims' Representations (ICC-01/09-17-Conf-Exp-Corr) and annexes 1 and 5' (29 March 2010) ICC-01/09-17-Corr-Red, paras 40-45. In the Cote d'Ivoire Situation, out of 655 individual representations received, 20 where from persons aged 0-20 years old while the majority (232) were 31-50 years old. Of these representations (655), 423 were men and 179 were women, while 53 did not specify gender, see *Côte d'Ivoire situation* 'Report on Victims' Representations' (30 August 2011) ICC 02/11-11-Red, paras 35-36.

125 *Kenya situation*, 'Public Redacted Version Of Corrigendum to the Report on Victims' Representations (ICC-01/09-17-Conf-Exp-Corr) and annexes 1 and 5' (29 March 2010) ICC-01/09-17-Corr-Red, paras 48-49.

in the victims' representations received under Article 15 of the Rome Statute.[126] Clear instructions such as these are welcomed. However, the Registry must fulfil these directives and ICC judges should follow-up and monitor this fulfilment. Thus, the ICC must go beyond "regretting" this exclusion of certain groups such as children, and thus identify them and disseminate information in a child-friendly manner (as explained in the previous section on outreach above), so that children can make meaningful representations under Article 15(3) of the Rome Statute.

5.3.4.2 Pre-Trial Stage – Confirmation of Charges

Although victims' participation in the initial pre-trial stage of an investigation has been limited, it has been widely accepted in the pre-trial stage, once warrants of arrest or summons to appear have been issued and thus individual suspects and charges have been identified by the prosecution. Victims have the possibility to make submissions as regards requests for conditional release and may address the Pre-Trial Chamber by way of both oral and written observations on either procedural or substantive aspects raised at the confirmation of charges hearing. Under the Rome Statute, victims also have the possibility to make submissions on the prosecution's decision not to investigate (Article 53 of the Rome Statute, Rules 93, 107 and 109 of the RPE), on measures for the preservation of evidence (Articles 56(3) and 57(3)(c) of the Rome Statute), on requests for protective or special measures (Rules 87 and 88 of the RPE), on the decision to hold a confirmation of charges hearing *in absentia* (Rules 93 and 125 of the RPE), and on proceedings for the amendment of the charges brought against the suspect (Rules 93 and 128 of the RPE).

Victims in the pre-trial stage have overall remained anonymous vis-à-vis the defence, and thus have solely had access to the public record of the case and their legal representatives have attended public sessions of the confirmation of charges hearing.[127]

During the confirmation of charges hearing, victims (through their legal representatives) have the right to make opening and closing statements. However, the Chambers have interpreted that this right is limited to the charges brought by the prosecution against the accused, and thus victims

126 *Côte d'Ivoire Situation* 'Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d'Ivoire' (3 October 2011) ICC 02/11-14, para. 211.

127 *Lubanga case* 'Decision on the Arrangements for Participation of Victims a/0001/06, a/0002/06 and a/0003/06 at the Confirmation Hearing' (22 September 2006) ICC-01/04-01/06-462-tEN, 7-8; *Bemba case,* 'Fourth Decision on Victims' Participation' (12 December 2008) ICC-01/05-01/08-320, paras 103-107; The Prosecutor v Bahar Idriss Abu Garda (*Abu Garda case*) 'Decision on victims' modalities of participation at the Pre-Trial Stage of the Case' (6 October 2009) ICC-02/05-02/09-136, paras 11- 18.

cannot add new charges, or indeed extend the factual basis of the charges.[128] Hence, ICC practice thus far has been emphatic that investigations and the eventual decision to bring charges against suspects is an exclusive power of the Prosecutor and thus victims' participation in this regard is not appropriate.

Regretfully, this ICC practice impedes victims from addressing crimes committed against children if these have not been included in the charges brought against a suspect. Pursuant to the Preamble of the Rome Statute, the ICC was established to stop impunity for the commission of all crimes within the jurisdiction of the ICC. Hence, although the Prosecutor has the power to choose his or her prosecutorial strategy and limit the charges brought against individuals, Article 54(1) of the Rome Statute also provides that the Prosecutor "shall" establish the truth, extending the investigation to cover all facts and evidence relevant to an assessment of whether there is criminal responsibility under the Rome Statute. Thus, victims' participation, particularly when the Prosecutor has omitted from the charges relevant facts that could be of the victims' interests to establish the truth, could be valuable at the early stages of the confirmation of charges.

However, victims could still address in their submissions the children's dimension of the crimes included in the charges and how the crimes particularly affected or caused harm to child victims. For example, if the prosecution charges a suspect with crimes of sexual violence, victims or their legal representatives could make submissions at the pre-trial stage as to how these crimes particularly or disproportionately affected children or how these crimes caused particular harm to children. Hence, although it is ultimately the Prosecutor's decision as to what will be included in the "facts and circumstances" of the charges, victims' submissions in this regard could encourage the Prosecutor to amend the charges or recharacterise the facts in a given case.

5.3.4.3 Trial Stage

In reference to the trial stage, Rule 93 of the RPE specifically refers to phases of the trial in which victims may participate, including the decision on the joinder or severance of trials (Rule 136 of the RPE), proceedings on the admission of guilt (Rule 139 of the RPE), and assurance of non-prosecution (Article 93(2) of the Rome Statute and Rule 191 of the RPE). However, in the practice of the ICC thus far, victim's participation has gone well beyond these examples.

The Trial Chamber in the *Lubanga case* set the general guidelines on matters related to victims' participation in trial proceedings.[129] The principles estab-

128 *Katanga and Ngudgolo case* 'Decision on the Set of Procedural Rights Attached to Procedural Status of Victim at the Pre-Trial Stage of the Case' (13 May 2008) ICC-01/04-01/07-474, para. 122.

129 *Lubanga case* 'Decision on victims' participation' (18 January 2008) ICC-01/04-01/06-1119, para. 84.

lished in that decision were subsequently followed, at least in general terms, by the Trial Chambers in the *Katanga and Ngdujolo case* and *Bemba case*, and confirmed by the Appeals Chamber.[130]

In general terms, participation at the trial stage has been decided on the basis of evidence or issues under consideration at any particular point in time and victims wishing to participate should set out the nature and the detail of the proposed intervention in a discrete written application.[131] Moreover, in accordance with Rule 131(2) of the RPE, victims have been granted the right to consult the record of the proceedings, including the index, subject to any restrictions concerning confidentiality and the protection of national security information. In principle, victims have had the right to access and receive notification of all public filings and those confidential filings that concern them, insofar as this does not breach protective measures in place.[132] Victims have also had the possibility to participate in public hearings and to file written submissions and participate in closed or *ex parte* hearings or file confidential or *ex parte* submissions, depending on the circumstances.[133] Victims have also presented evidence pertaining to the guilt or innocence of the accused and to challenge the admissibility or relevance of evidence during trial proceedings.[134] Victims have also been granted the right to lead evidence related to reparations during the trial proceedings under Regulation 56 of the RoC.[135]

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130 *Bemba case* 'Corrigendum to Decision on the participation of victims in the trial and on 86 applications by victims to participate in the proceedings' (12 July 2010) ICC-01/05 01/08-807-Corr; *Katanga and Ngudgolo case* 'Décision relative aux modalités de participation des victimes au stade des débats sur le fond' (22 January 2010) ICC-01/04-01/07-1788, paras 81-84; and 'Judgment on the Appeal of Mr Katanga Against the Decision of Trial Chamber II of 22 January 2010 Entitled "Decision on the Modalities of Victim Participation at Trial"' (16 July 2010) ICC-01/04-01/07-2288; *Lubanga case* 'Judgment on the appeals of The Prosecutor and The Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008' (11 July 2008) ICC-01/04-01/06-1432.

131 *Lubanga case* 'Decision on victims' participation' (18 January 2008) ICC-01/04-01/06-1119, paras 101-104.

132 *Lubanga case* 'Decision on victims' participation' (18 January 2008) ICC-01/04-01/06-1119, paras 105-107.

133 *Lubanga case* 'Decision on victims' participation' (18 January 2008) ICC-01/04-01/06-1119, paras 112-115.

134 *Lubanga case* 'Decision on victims' participation' (18 January 2008) ICC-01/04-01/06-1119, paras 108-111; *Lubanga case* 'Judgment on the appeals of The Prosecutor and The Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008' (11 July 2008) ICC-01/04-01/06-1432, paras 93-105; *Katanga and Ngudgolo case* 'Décision relative aux modalités de participation des victimes au stade des débats sur le fond' (22 January 2010) ICC-01/04-01/07-1788, paras 81-84; and 'Judgment on the Appeal of Mr Katanga Against the Decision of Trial Chamber II of 22 January 2010 Entitled "Decision on the Modalities of Victim Participation at Trial"' (16 July 2010) ICC-01/04-01/07-2288, 37-40; *Bemba case* 'Corrigendum to Decision on the participation of victims in the trial and on 86 applications by victims to participate in the proceedings' (12 July 2010) ICC-01/05 01/08-807-Corr paras 29-37.

135 *Lubanga case* 'Decision on victims' participation' (18 January 2008) ICC-01/04-01/06-1119, paras 119-122.

Regarding individuals with dual status of victim and witness (which in some instances included children), the Trial Chamber in the *Lubanga case* adopted some key principles. The Chamber rejected the suggestion that victims appearing before the ICC in person should automatically be treated as witnesses.[136] It also concluded that an individual's participation as a victim and witness in the proceedings should not compromise his or her security, but should not grant him or her any right in addition to those of someone who is only a victim or a witness.[137]

In cases involving children, victims' legal representatives could offer crucial evidence to the Chamber in the interests of their clients. For example, expert reports on trauma or the psychological impact crimes charged have on children, could be useful for sentencing and reparations purposes. However, expert evidence could also be offered so that the judicial process adapts to the needs of child victims pursuant to Rule 86 of the RPE. For example, in cases in which child victims/witnesses will participate in person, the legal representatives could offer an expert on judicial processes with children, so that the proceedings are carried out in a manner consistent with the rights of the accused, but also with the needs and well-being of child victims and witnesses. Equally, the legal representatives could request that a special procedure is adopted in which a child or group of child victims address the judges via video-link by way of an unsworn statement, thus avoiding the burden of travelling to The Hague and give testimony in court.[138] Likewise, legal representatives of child victims could suggest *in situ* visits of the Chamber, for example to meet with child victims in their own town or country. For example, in cases involving child soldiers, the Trial Chamber could visit a demobilisation centre or a former military camp.[139]

5.3.4.4 Appeal Stage

It is important to note that in the ICC system victims have not been granted with the right to file an appeal for a decision affecting their interests. The only possibility that exists in the Rome Statute is that of an appeal against a reparations order.

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136 *Lubanga case* 'Decision on victims' participation' (18 January 2008) ICC-01/04-01/06-1119, paras 132-133.

137 'Decision on Certain Practicalities regarding Individuals who have the Dual Status of Witness and Victim' (5 June 2008) ICC-01/04-01/06-1379, para. 52.

138 This would be in line with the UN Guidelines, which state that children's right to participation includes their right to express their views "in his or her own words" and thus contribute to decisions affecting his or her life. See: UN Guidelines, para. 8(d).

139 ICC Press and Media, 'ICC judges in case against Katanga and Ngudjolo Chui visit Ituri' (Press release 27 January 2012) < http://www.flickr.com/photos/icc-cpi/sets/72157629051394811/> accessed 8 August 2013.

However, victims have been granted status to participate in appeals proceedings, although their participatory status is not automatic, and thus does not continue if they participated in the original proceedings giving rise to the appeal. Hence, victims should apply for participation and parties must make new submissions on whether or not they should be granted participatory status. In general, victims who have participated in the proceedings giving rise to the appeal have been granted status to participate in the appeal. However, this practice (adopted following an Appeals Chamber decision on this matter)[140] has proven burdensome, not only to victims, who have to submit an application to participate, but also to the parties, who need to submit observations on the matter. This has also inevitably affected the expeditiousness of interlocutory appeal proceedings, adding a further procedural step to these appeals.[141] Thus, it would be more favourable, not only to the victims, but also to the parties in the proceedings, and for the expeditiousness of proceedings as a whole, if victims would have the automatic right to participate in appeals of decisions in which they participated.

5.4 Protection of Child Victims and Witnesses

5.4.1 Obligation to protect and support

Throughout the Rome Statute and other ICC provisions, protection of victims and witnesses is regulated, taking into consideration the particular needs of different groups of victims, including children.
Article 68(1) of the Rome Statute, which is the main provision in this regards, states the following:

> 'The ICC shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses. In so doing, the ICC shall have regard to all relevant factors, including age, gender as defined in Article 7, paragraph 3, and health, and the nature of the crime, in particular, but not limited to, where the crime involves sexual or gender violence or violence against children. The Prosecutor shall take such measures particularly during the investigation and prosecution of such crimes. These measures shall not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.'

140 *Lubanga case* 'Judgment on the appeal of Mr Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled "Décision sur la demande de mise en liberté provisoire de Thomas Lubanga Dyilo"' (13 February 2007) ICC-01/04-01/06-824.

141 *Lubanga case 'Judgment* on the appeal of Mr Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled "Décision sur la demande de mise en liberté provisoire de Thomas Lubanga Dyilo"' (13 February 2007) ICC-01/04-01/06-824.

Although this provision refers in general to the "Court" and thus involves all organs of the ICC that interact with victims and witnesses, it gives special consideration to the Prosecutor, who shall take appropriate measures, particularly in the initial stages of the investigation, when other organs of the ICC may not yet be involved. In fact, as early on as the moment when a situation is referred to the ICC pursuant to Article 13 of the Rome Statute, the Prosecutor may already adopt protective measures vis-à-vis individuals at risk (*i.e.* by withholding information to States and pursuant to Article 54(3)(f) of the Rome Statute). Thus, it is clear that the Prosecutor has an obligation to protect individuals interacting with the ICC at the very outset of the ICC's involvement, even when judicial proceedings have not yet started and Chambers have not been seized of any matter.

In early investigation stages, the OTP has an obligation to protect children with whom it interacts, particularly any potential child witness that is interviewed at this early stage. The Innocenti Research Center has proposed that investigators collaborate only with trustworthy, impartial, professional, reliable and reputable organisations, including child protection agencies, when working through "intermediaries" in the field.[142] Furthermore, it recommends that the OTP develops guidelines for all members of the Office that interact with child victims and witnesses.[143]

Referring to children in particular, the Rome Statute and the RPE refer to the need to have persons with expertise in children. Article 43(2) of the Rome Statute provides that the Prosecutor shall appoint advisers with legal expertise in issues, including, *inter alia*, violence against children. As noted by the Innocenti Research Center, to date the OTP has not appointed any adviser on violence against children and it is unclear whether it has an expert on children's rights among its staff.[144] However, as stated previously, the OTP has established the GCU, which is part of its Investigations Division. The GCU has ensured the inclusion of child-friendly guidelines throughout the investigative process and organises trainings to staff members on child-related issues.[145] The GCU may also travel to the situation country to identify possible intermediaries and modes of operating. Furthermore, a psychologist of the GCU accompanies every investigation team that is to interview children.[146]

142 Cecile Aptel, *Children and Accountability for International Crimes: The Contribution of International Criminal Courts* (Innocenti Working Paper, UNICEF Innocenti Research Centre August 2010) 30.

143 Cecile Aptel, *Children and Accountability for International Crimes: The Contribution of International Criminal Courts* (Innocenti Working Paper, UNICEF Innocenti Research Centre August 2010) 31.

144 Cecile Aptel, *Children and Accountability for International Crimes: The Contribution of International Criminal Courts* (Innocenti Working Paper, UNICEF Innocenti Research Centre August 2010) 33.

145 Redress, *Victims, Perpetrators or Heroes? Child Soldiers before the ICC* (September 2006) 35.

146 Redress, *Victims, Perpetrators or Heroes? Child Soldiers before the ICC* (September 2006) 36.

The Rome Statute also provides in Article 43(6) for the creation of the VWU. This provision provides that the VWU, as an entity within the Registry:

> '(…) shall provide, in consultation with the OTP, protective measures and security arrangements, counselling and other appropriate assistance for witnesses, victims who appear before the ICC and others who are at risk on account of testimony given by such witnesses.'

In light of this provision, the VWU protects three categories of persons: a) witnesses who appear before the ICC; b) victims who appear before the ICC; and) other persons at risk on account of testimony given by others. Thus, ICC provisions refer to a broader group of persons, beyond those witnesses and victims that appear before the ICC to include, for example, family members that could be at risk.[147] Therefore the ICC's scope of protection goes beyond victims with participatory status and witnesses appearing in court and may include their family members, and even third persons referred to in their testimony as well as intermediaries, translators, etc., who may be at risk.

Pursuant to Rule 17 of the RPE, the VWU should provide victims and witnesses and others at risk with adequate protective and security measures, including short-term and long-term plans for their protection. The VWU should also assist them in obtaining medical and psychological assistance. Pursuant to this provision, the VWU should also play an active role in making recommendations and offering trainings to other organs of the ICC on issues of trauma, sexual violence, security and confidentiality and codes of conduct.

Rule 19 of the RPE foresees that the VWU should have experts, among other areas, on children and particularly traumatised children. Moreover, Rule 17 of the RPE foresees that the VWU may appoint a child-support person to assist a child witness through all stages of the proceedings. A similar "support person" is foreseen in the UN Model Law. This support person should accompany the child from his or her initial interaction with the ICC (*i.e.* first interview with an OTP investigator) until the end of the judicial process (*i.e.* trial and eventual reparations process). The support person should not only provide emotional support, but also act as a liaison between the child and his or her family and legal representative. The support person could also carry out the familiarisation process and even request protective measures on behalf of the child.[148]

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147 For example, Rule 93 of the RPE refers to victims participating in proceedings and "other victims", while Regulation 93(1) of the RoR refers to "persons at risk of the territory of the State where an investigation is taking place" and Regulation 95 of the RoR refers to a "person at risk of harm or death" while Regulation 96 of the RoR refers to "others considered at risk of harm and/or death on account of a testimony given by a witness or as result of their contact with the ICC".

148 UN Office on Drugs and Crime, *Justice in Matters involving Child Victims and Witnesses of Crime: Model Law and Related Commentary* (April 2009), articles 16-19.

In practice, the VWU works with protected individuals, including children, in three main areas: a) protection; b) support; and c) operations. Regarding protection, the VWU has developed best practices during the last years and offers procedural protective measures (subject to authorisation of the relevant Chamber), protective measures outside the ICC, and lastly, a relocation programme. In relation to support, the VWU provides support to victims and witnesses appearing before the ICC, in order to ensure their psychological well-being, dignity and privacy. This assistance commences from the moment the person is due to travel to the ICC and continues 24 hours per day and seven days per week, until the person returns to his or her home or until needed. Finally, regarding operations, the VWU makes the logistical and immigration arrangements to ensure that victims and witnesses appear before the ICC.[149]

Notwithstanding its broad mandate, it is important to note that the VWU cannot act alone, as it will only implement its protection mechanisms upon referral by a party, participant or the Chamber. Thus, for example, when the prosecution considers that a witness or potential witness may be at risk, it will refer his or her situation to the VWU, who will then make an assessment on the protective measures or assistance required.[150]

Ultimately the judges of the ICC will decide on judicial protective measures and other special measures that could be adopted to avoid the re-victimisation of a child witness during judicial proceedings. Thus, it is essential that pursuant to Article 36(8)(b) of the Rome Statute, individuals with expertise in, *inter alia*, violence against children, are elected as judges.

5.4.2 Protective and special measures available to child victims and witnesses

The *Lubanga case* and the *Katanga and Ngudjolo case* before the ICC have been challenging in many ways, particularly since they both involved crimes allegedly committed against children. While in the ad-hoc tribunals only a few young adults gave evidence to events that had occurred when they were still under 18 years of age, in the ICC's first cases, a significant group of victims and witnesses in these proceedings were children either at the time of the events

149 *ICC, Structure of the Court, Protection, Victims and Witnesses Unit,* <http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/protection/Pages/victims%20and%20witness%20unit.aspx> accessed 8 August 2013.

150 At the beginning of judicial proceedings this interaction between the VWU and the prosecution was not at all clear, and it actually led to various Chambers' rulings on the matter. See: *Lubanga case* 'Decision on Disclosure Issues, Responsibilities for Protective Measures and other Procedural Matters' (24 April 2008) ICC-01/04-01/06-1311-Anx; 'Decision on the prosecution and defence applications for leave to appeal the Trial Chamber's "Decision on Disclosure Issues, Responsibilities for Protective Measures and other Procedural Matters"'(16 December 2008) ICC-01/04-01/06-1557.

or at the time of their interaction with the ICC.[151] In the SCSL, on the other hand, the prosecution called children to testify for cases involving child recruitment. Thus, its practice and "lessons learned" could be useful for the ICC in current and future cases involving child witnesses.[152]

In the *Lubanga case*, ten former child soldiers testified.[153] Although most of these witnesses were already young adults by the time they testified, they were still children when ICC investigators first contacted them.[154] As stated by An Michels in her experience with witnesses in the SCSL, witnesses older than 18 who were children when the crimes were committed should still be considered child witnesses at the time they testify. She explains that this decision responds firstly to the reality that the exact age of many former child soldiers cannot be established. Furthermore, former child soldiers who spent years fighting during a crucial time of their development may show a significant difference between their mental age and their biological age.[155]

The CRC Committee has established that children cannot be heard effectively (either as victims or witnesses) when the environment is intimidating, hostile, insensitive or inappropriate for her or his age. The CRC Committee has stated that proceedings should be accessible and child appropriate, and measures must be adopted, such as child-friendly design of courtrooms, clothing of judges and lawyers, sight screens and separate waiting rooms.[156] Furthermore, the CRC Committee has established that the child should be informed about issues such as the availability of health, psychological and social services and there should be a support mechanism in place and protective measures available.[157] The CRC Committee has also recommended that children be

151 In general, only four per cent of the ad-hoc tribunal's witnesses were between 18-30 years old when they testified before these tribunals (and thus possibly children at the time of the events). Furthermore, witnesses who were children when the crimes occurred but adults at the time of the testimony were treated like any other adult witness. Thus, little can be taken from the ad-hoc tribunals' practice regarding child witnesses. See: Cecile Aptel, *Children and Accountability for International Crimes: The Contribution of International Criminal Courts* (Innocenti Working Paper, UNICEF Innocenti Research Centre August 2010) 28.

152 UN Office of the Special Representative of the Secretary-General for Children Affected by Armed Conflict, *Children and Justice During and in the Aftermath of Armed Conflict* (September 2011) 14.

153 UN Office of the Special Representative of the Secretary-General for Children Affected by Armed Conflict, *Children and Justice During and in the Aftermath of Armed Conflict* (September 2011) 15.

154 *Lubanga case* 'Judgment pursuant to Article 74 of the Rome Statute' Separate and Dissenting opinion of Judge Odio Benito' (14 March 2012) ICC-01/04-01/06-2842, para. 32.

155 An Michels, *Protecting and supporting children as witnesses: lessons learned from the Special Court of Sierra Leone*; cited in Cecile Aptel, *Children and Accountability for International Crimes: The Contribution of International Criminal Courts* (Innocenti Working Paper, UNICEF Innocenti Research Centre August 2010) 28.

156 CRC Committee, *General Comment No. 12 (2009): The right of the child to be heard* (20 July 2009) CRC/C/GC/12, para. 34.

157 CRC Committee, *General Comment No. 12 (2009): The right of the child to be heard* (20 July 2009) CRC/C/GC/12, para. 64.

provided with clear explanations as to how, when and where the hearing will take place and who the participants will be.[158] In reference to this last recommendation, the UN Special Representative for Children and Armed Conflict has also stated that expectations of children must be managed as many potential child witnesses or victims may have an erroneous idea as to what they can obtain for being witnesses (it may seem all too exciting from a child's point of view).[159] Similar recommendations are made by the UN Guidelines, which could be advisable for future ICC proceedings involving child witnesses and victims.[160]

Since the ICC relies greatly on intermediaries working in the field in situation countries, it is necessary that these individuals and organisations are trained and supervised in order to prevent manipulation or any adverse contact between intermediaries and child victims or witnesses.[161] Ultimately, the child's contact with a given intermediary could also affect his or her reliability as a witness. In fact in the *Lubanga case*, only one of the ten child witnesses was found to be reliable by the Trial Chamber, as the credibility and reliability of the other child witnesses were significantly affected by their involvement with certain intermediaries. These nine individuals were not relied on by the Chamber and those that had dual status finally lost their right to participate as victims in the case.[162] As the Trial Chamber concluded in the *Lubanga case*, these children were potentially taken advantage of by the intermediaries and, irrespective of their credibility or reliability, they were children exposed to armed conflict and thus vulnerable to manipulation.[163] Thus, protective measures for children should not only encompass judicial and non-judicial measures vis-à-vis supporters of the accused person, but also in respect of persons that often work for the ICC in the field, such as the intermediaries discussed above.

In the ICC's practice so far, victims and witnesses may be granted judicial and non-judicial protective and special measures. As regards the judicial measures, the RPE provides the following:

158 CRC Committee, *General Comment No. 12 (2009): The right of the child to be heard* (20 July 2009) CRC/C/GC/12, para. 41.

159 UN Office of the Special Representative of the Secretary-General for Children Affected by Armed Conflict, *Children and Justice During and in the Aftermath of Armed Conflict* (September 2011) 13.

160 UN Guidelines, para. 30(d).

161 *Lubanga case* 'Judgment pursuant to Article 74 of the Rome Statute' (14 March 2012) ICC-01/04-01/06-2842, paras 482-483.

162 *Lubanga case* 'Judgment pursuant to Article 74 of the Rome Statute' (14 March 2012) ICC-01/04-01/06-2842, paras 207 and 478-484.

163 *Lubanga case* 'Judgment pursuant to Article 74 of the Rome Statute' (14 March 2012) ICC-01/04-01/06-2842, para. 482.

'Rule 87 Protective measures
1. Upon the motion of the Prosecutor or the defence or upon the request of a witness or a victim or his or her legal representative, if any, or on its own motion, and after having consulted with the VWU, as appropriate, a Chamber may order measures to protect a victim, a witness or another person at risk on account of testimony given by a witness pursuant to Article 68, paragraphs 1 and 2. The Chamber shall seek to obtain, whenever possible, the consent of the person in respect of whom the protective measure is sought prior to ordering the protective measure.
(…)
3. A Chamber may, on a motion or request under sub-rule 1, hold a hearing, which shall be conducted in camera, to determine whether to order measures to prevent the release to the public or press and information agencies, of the identity or the location of a victim, a witness or other person at risk on account of testimony given by a witness by ordering, *inter alia*:
(a) That the name of the victim, witness or other person at risk on account of testimony given by a witness or any information which could lead to his or her identification, be expunged from the public records of the Chamber;
(b) That the Prosecutor, the defence or any other participant in the proceedings be prohibited from disclosing such information to a third party;
(c) That testimony be presented by electronic or other special means, including the use of technical means enabling the alteration of pictures or voice, the use of audio-visual technology, in particular videoconferencing and closed-circuit television, and the exclusive use of the sound media;
(d) That a pseudonym be used for a victim, a witness or other person at risk on account of testimony given by a witness; or
(e) That a Chamber conduct part of its proceedings in camera.

Rule 88 Special measures
1. Upon the motion of the Prosecutor or the defence, or upon the request of a witness or a victim or his or her legal representative, if any, or on its own motion, and after having consulted with the VWU, as appropriate, a Chamber may, taking into account the views of the victim or witness, order special measures such as, but not limited to, measures to facilitate the testimony of a traumatised victim or witness, a child, an elderly person or a victim of sexual violence, pursuant to Article 68, paragraphs 1 and 2. The Chamber shall seek to obtain, whenever possible, the consent of the person in respect of whom the special measure is sought prior to ordering that measure.
2. A Chamber may hold a hearing on a motion or a request under sub-rule 1, if necessary in camera or ex parte, to determine whether to order any such special measure, including but not limited to an order that a counsel, a legal representative, a psychologist or a family member be permitted to attend during the testimony of the victim or the witness.
(…)
5. Taking into consideration that violations of the privacy of a witness or victim may create risk to his or her security, a Chamber shall be vigilant in controlling the manner of questioning a witness or victim so as to avoid any harassment or

intimidation, paying particular attention to attacks on victims of crimes of sexual violence.'

One of the possible protective measures available for child victims and witnesses is anonymity. Although it has been proposed that the testimony of children should always be anonymous;[164] this position could be in breach with other rights, namely the rights of the accused person pursuant to Article 67 of the Rome Statute. Accordingly, child witnesses have had their identities protected vis-à-vis the public, but they have testified in closed or private sessions in which the accused was present.[165] Thus, the accused has always known the identity of child witnesses well in advance of their testimony. However, a "curtain" has been used in the courtroom so that the witness and the accused person do not have eye contact. The accused, on the other hand, has been able to see the witness via a computer screen.[166]

Regarding child victims with participating status, most have remained anonymous vis-à-vis the accused person. However, if the victim wished to participate substantively in the proceedings (*i.e.* present evidence or make a submission) his or her anonymity has been reconsidered and eventually his or her identity has been disclosed to the accused.[167]

Considering that it was the first-ever trial before the ICC, and bearing in mind that child witnesses were due to testify in court, the Trial Chamber in the *Lubanga case* set out in a decision some of the measures available as regards "vulnerable witnesses", including children and/or victims of sexual violence.[168] In its decision, the Trial Chamber foresaw the use of measures such as testimonies in closed sessions, use of video-link, and the presence of

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164 ICTJ, *Through a New Lens: A Child-Sensitive Approach to Transitional Justice* (August 2011) 21.

165 See for example: *Lubanga case,* Transcript of hearing (30 January 2009) ICC-01/04-01/06-T-113-ENG, 20-21.

166 See for example: *Lubanga case,* Transcript of hearing (4 February 2009) ICC-01/04-01/07-T-116-Red-ENG 66-67.

167 *Lubanga case* 'Decision on victims' participation' (18 January 2008) ICC-01/04-01/06-1119.

168 Recently in the Kenya Situation cases, the VWU has defined "vulnerable witness" as follows: For the purposes of this protocol witnesses are considered to be vulnerable if they face an increased risk to suffer psychological harm through the process of testifying, and/or to experience psychosocial or physical difficulties which affect their ability to testify. The vulnerability of a witness can be determined by different factors: factors related to the person: *age* (*children* or elderly), personality, disability (including cognitive impairments), mental illness or psychosocial problems (such as trauma-related problems and/or lack of social support); factors related to the nature of the crime: in particular victims of sexual or gender-based violence, *children that are victims of violence*, and victims of torture or other crimes involving excessive violence; factors related to particular circumstances, such as significantly increased stress or anxiety due to relocation/resettlement or fear of retaliation, adaptation difficulties related to cultural differences or other factors. (emphasis added). *Ruto and Sang case,* 'Victims and Witnesses Unit's Amended Protocol on the practices used to familiarise witnesses for giving testimony' (25 April 2013) ICC-01/09-01/11-704-Anx, footnote 5.

psychologists to support the witnesses. It also provided that vulnerable witnesses could be entitled to more frequent breaks, to have control of their testimony and to use the language of their preference.[169]

In practice, and pursuant to Rule 87 of the RPE, most testimonies of child witnesses before the ICC have been held in closed or private sessions or with voice and face distortion and pseudonym when sessions are public.[170] Video-link has also been successfully used in ICC proceedings. This possibility avoids eye contact between the witness and the accused and avoids other intimidating factors such as giving testimony in a courtroom in a foreign country.[171] Video-link is also favourable for children because they may give testimony without leaving their hometown or country, while in a safe and protected building or room nearby to their place of origin.[172] Also, because the child witness does not have to prepare to travel to The Hague, the child's life is less interrupted by the testimony, including any schooling or other learning or social activities the child may have. However, the International Bar Association (IBA) has also noted that video-link testimony may make it difficult for counsel to "connect" with the witness and that the small field offices in which video-link testimonies are held may also be "oppressive" for the witness.[173] Moreover, other technical matters, such as the bad quality of the video-link, may also affect the value of the testimony.

In the *Lubanga case*, a limited number of witnesses gave testimony via a deposition in accordance with Rule 68 of the RPE. This meant that witnesses gave testimony in closed session in the presence of counsel and a Legal Adviser to the Chamber. Any objection as to the questioning was noted and subsequently resolved by the Chamber.[174] Although this was not used for child witnesses in the *Lubanga case*, this could be a possibility to use in the future for child witnesses. Such a modality of questioning could be made in

169 *Lubanga case* 'Decision on various issues related to witnesses' testimony during trial' (29 January 2008) ICC-01/04-01/06-1140. In another decision in the *Lubanga case*, the Trial Chamber also dealt with the special circumstances of individuals with dual status. In this decision the Trial Chamber dealt with complex issues of client-lawyer relationship of victims and their legal representatives vis-à-vis the party calling the same individual as a witness. It also dealt with the situation of child witnesses-victims and their protection. See: *Lubanga case,* ICC-01/04-01/06-1379.

170 *Lubanga case* 'Judgment pursuant to Article 74 of the Rome Statute' (14 March 2012) ICC-01/04-01/06-2842, paras 115-117.

171 As noted by Christine Kunst, there is a balance of interests that must be struck when deciding on whether to use video-link technology, particularly between the needs of a vulnerable witness and the right of the accused person to confront witnesses against him or her. See: Christine Kunst, *The Protection of Victims and witnesses at International and Internationalized Criminal Courts – the example of the ECCC* (Wolf Legal Publishers, 2013) 229-230.

172 *Lubanga case,* Transcript of hearing (30 January 2009) ICC-01/04-01/06-T-113-ENG.

173 International Bar Association, *Witnesses before the International Criminal Court*, July 2013, page 18.

174 Transcript of hearing (12 November 2010) ICC-01/04-01/06-T-333-Red-ENG, 18 to 21.

an office or in a more child-friendly environment than the courtroom and with the presence of minimal staff (one counsel per party and a legal adviser to the Chamber). Furthermore, it avoids witnesses having their testimony interrupted by objections that sometimes may be confusing and distressful. In fact, such a practice could be in line with the Council of Europe's recommendations that court sessions involving children should be adapted, and disruption and distractions during court sessions should be kept to a minimum.[175]

In the *Katanga and Ngudjolo case,* the judges of the Trial Chamber, along with counsel to the parties and the participating victims in the trial and Registry staff, visited the DRC, more specifically three localities in which the events concerning this trial allegedly took place.[176] Such visits could be beneficial for cases involving children, in which judges could visit places to know the conditions in which the crimes allegedly took place. Although the judges in the *Katanga and Ngudjolo case* did not interview individuals, in future cases an activity involving children of an affected community could be organised, in which children could informally express to the Trial Chamber their views on the crimes, or their expectations in reference to the trial (including, for example, reparations). With these visits, judges would be able to understand the conditions in which the crimes against children allegedly took place in a manner that is not prejudicial to the best interests of the child, particularly his or her well-being or security, which may be affected by in-court testimony in the headquarters of the ICC in The Hague.

The Pre-Trial Chamber and the Trial Chamber in the *Lubanga case* also took early decisions regarding the witness proofing process, which in the ad-hoc tribunals had been the common practice. This practice, in which parties are responsible for preparing witnesses before trial appearance, significantly changed in the Lubanga case, as Trial Chamber I decided that, upon their arrival in The Hague, witnesses would be prepared or "familiarised" by special staff of the VWU.[177]

These early ICC decisions prohibiting witness proofing have been thoroughly discussed by academics. While some authors support the practice of witness

175 Council of Europe: Committee of Ministers, *Guidelines of the Committee of Ministers of the Council of Europe on Child-Friendly Justice* (17 November 2010).

176 ICC Press and Media, 'ICC judges in case against Katanga and Ngudjolo Chui visit Ituri' (Press release 27 January 2012) < http://www.flickr.com/photos/icc-cpi/sets/72157629051394811> accessed 8 August 2013.

177 *Lubanga case* 'Decision on the Practices of Witness Familiarisation and Witness Proofing' (08 November 2006) ICC-01/04-01/06-679; Decision regarding the practices used to prepare and familiarize witnesses for giving testimony at trial' (30 November 2007) ICC-01/04-01/06-1049, and 'Decision regarding the Protocol on the practices to be used to prepare witnesses for trial' (23 May 2008) ICC-01/04-01/06-1351.

proofing in the ad-hoc tribunals and the SCSL,[178] others have welcomed the ICC's prohibition of this practice.[179]

In regards to victims of sexual violence, Van Schaack has noted that witness proofing may enable witnesses to refresh their memory, review prior statements, identify relevant facts, present their evidence in a more complete, orderly and structured manner and prepare for cross-examination. To the contrary, the author considers that allowing witnesses to take the stand "cold" threatens to render them unprepared to effectively testify in Court, set them up for re-traumatisation during cross-examination, and risk their being discredited where their testimony is stilted, confused or diverges from prior statements.[180]

The Innocenti Research Center has also been critical to this approach by the ICC, stating that witness proofing allows the witness to better get to know the party calling them and thus feel less isolated in the courtroom when undergoing cross-examination. It has been stated that the current practice means that witnesses meet very briefly with counsel and thus are "interrogated by strangers". The Innocenti Research Center states that witness proofing could still be limited to avoid "coaching", and could even include an informal meeting with judges and lawyers of both parties in which matters unrelated to the case could be casually discussed and thus build confidence of the child that should testify.[181]

Recently, Trial Chamber V in the two Kenya Situation cases changed the approach that had been adopted by the previous Trial Chambers in the ICC, thus allowing some sort of witness proofing, although by the name of "witness preparation". Trial Chamber V defined the term ""witness preparation" as "a meeting between a witness and the party calling that witness, taking place shortly before the witness's testimony, for the purpose of discussing matters relating to the witness's testimony". As for the concept of "witness

178 See for example: Elies Van Sliedregt, Witness Proofing in International Criminal Law: Introduction to a Debate. *Leiden Journal of International Law*, Volume 21 (2008); Karemaker, Taylor and Pittman, Witness Proofing in International Criminal Tribunals: A Critical Analysis of Widening Procedural Divergence, *Leiden Journal of International Law*, Volume 21 (2008).

179 See for example: Wayne Jordash, The Practice of 'Witness Proofing' in International Criminal Tribunals: Why the International Criminal Court Should Prohibit the Practice, *Leiden Journal of International Law*, Volume 22 (2009); Kai Ambos, "Witness proofing" before the ICC: Neither legally admissible nor necessary, in: Carsten Stahn and Göran Sluiter (eds), *The Emerging Practice of the International Criminal Court* (Brill 2008); Kai Ambos, Witness Proofing in International Criminal Tribunals: A Reply to Karemaker, Taylor and Pittman, *Leiden Journal of International Law*, Volume 21 (2008).

180 Beth Van Schaack, Witness Proofing and International Criminal Law, IntLawGrrls, 26 November 2008, <www.intlawgrrls.com> accessed on 8 August 2013. Their new website is: <http://ilg2.org> accessed on 8 August 2013.

181 Cecile Aptel, *Children and Accountability for International Crimes: The Contribution of International Criminal Courts* (Innocenti Working Paper, UNICEF Innocenti Research Centre August 2010) 34.

familiarisation", the Chamber determined that this is the support provided by the VWU to witnesses as set out in the Registry's "Unified Protocol on the practices used to prepare and familiarise witnesses for giving testimony".[182]

Trial Chamber V noted that a "witness who testifies in an incomplete, confused and ill-structured way because of lack of preparation is of limited assistance to the Chamber's truth-finding function".[183] Thus, Trial Chamber V allowed the practice of "witness preparation", previously prohibited by all other previous ICC Trial Chambers, stating "that permitting witnesses to re-engage with the facts underlying their testimony aids the process of human recollection, better enables witnesses to tell their stories accurately on the stand and can assist in ensuring that the testimony of a witness is structured and clear".[184] According to Trial Chamber V, "judicious witness preparation aimed at clarifying a witness's evidence and carried out with full respect for the rights of the accused is likely to enable a more accurate and complete presentation of the evidence, and so to assist in the Chamber's truth finding function" (footnoted omitted).[185]

Trial Chamber V recognised the difficulties that witnesses encounter when given testimony before the ICC. It first noted that the crimes under the jurisdiction of the ICC are legally and factually complex. Furthermore, most witnesses who appear before the ICC have no experience in a courtroom or the practice of examination and cross-examination, they come from places far from the seat of the ICC and have different cultural and linguistic backgrounds. Moreover, Trial Chamber V observed that witnesses often testify about events that happen many years ago. All these factors, in its view, increase the "likelihood that witnesses will give testimony that is incomplete, confused or ill-structured".[186]

In its decision allowing the practice of witness preparation, Trial Chamber V determined that "proper witness preparation also enhances the protection and well-being of witnesses, including by helping to reduce their stress and anxiety about testifying".[187] Most importantly, Trial Chamber V recognised that Article 68(1) of the Statute includes the Chamber's "duty to take appro-

182 *Ruto and Sang case,* Decision on witness preparation, 2 January 2013, ICC-01/09-01/11-524, para. 4.
183 *Ruto and Sang case,* Decision on witness preparation, 2 January 2013, ICC-01/09-01/11-524, para. 31.
184 *Ruto and Sang case,* Decision on witness preparation, 2 January 2013, ICC-01/09-01/11-524, para. 32.
185 *Ruto and Sang case,* Decision on witness preparation, 2 January 2013, ICC-01/09-01/11-524, para. 50.
186 *Ruto and Sang case,* Decision on witness preparation, 2 January 2013, ICC-01/09-01/11-524, para. 36.
187 *Ruto and Sang case,* Decision on witness preparation, 2 January 2013, ICC-01/09-01/11-524, para. 37.

priate measures to protect the well-being and dignity of witnesses".[188] Moreover, as regards vulnerable witnesses, Trial Chamber V stated that witness preparation "may help to reduce the psychological burdens of testimony, since those witnesses may face unique difficulties when being questioned repeatedly about traumatic events".[189] Lastly, it is important to observe that Trial Chamber V adopted a Protocol, in which it sets out the permitted and prohibited conducts that counsel should follow and it also required that these preparation sessions are video recorded. Thus, judicial control of "witness preparation" will be essential to safeguard the guarantees of a due process in the two Kenya Situation cases.

Moreover, it should be observed that the VWU continues to provide its assistance in the witness familiarisation process.[190] According to the latest VWU Protocol, once a vulnerable witness (which as noted above includes children) arrives at the location of testimony, and subject to the witness' consent, he/she is given a further assessment by the VWU psychologist. The psychologist then discusses any relevant special measures with the witness and seeks his/her consent.[191] The VWU has also developed a witness feedback programme which is "designed to provide information to the VWU that would allow the Unit to improve its provision of services to witnesses and to share outcomes and information with other relevant areas of the Court".[192]

Notwithstanding the abovementioned critics against the ICC's approach to witness proofing in the first trials (*Lubanga, Katanga and Ngudjolo and Bemba* cases) and the recent shift in the Kenya Situation, it is clear that the VWU, as a neutral and specialised body of the ICC, may be better placed to offer protective measures and support to a child witness, upon his or her arrival in The Hague, during his or her testimony, and during the "cooling-down" period after the testimony. On the other hand, it is also true that a casual exchange between the witness and counsel, as noted by Trial Chamber V in the Kenya Situation cases, could be beneficial, if this is carried out within legal parameters and in consultation with the VWU, and with the prior informed consent of the witness. Taking into consideration the problems faced in the Lubanga case as regards witnesses' reliability referred to above, the approach taken by Trial

188 *Ruto and Sang case,* Decision on witness preparation, 2 January 2013, ICC-01/09-01/11-524, para. 37.

189 *Ruto and Sang case,* Decision on witness preparation, 2 January 2013, ICC-01/09-01/11-524, para. 37.

190 Ruto *and Sang case,* Decision on witness preparation, 2 January 2013, ICC-01/09-01/11-524-Anx. See also: International Bar Association, *Witnesses before the International Criminal Court*, July 2013, page. 23

191 *Ruto and Sang case,* Victims and Witnesses Unit's Amended Protocol on the practices used to familiarise witnesses for giving testimony, 25 April 2013, ICC-01/09-01/11-704-Anx, paras 46-47.

192 *Ruto and Sang case,* Victims and Witnesses Unit's Amended Protocol on the practices used to familiarise witnesses for giving testimony, 25 April 2013, ICC-01/09-01/11-704-Anx, para. 101.

Chamber V, in which the "witness preparation" process involves more participation from counsel, particularly by the party calling the witness, is welcomed and probably will be followed in future ICC trials. Moreover, judicial safeguards, such as the adoption of the Protocol with prohibited conducts, as well as the video recording of these sessions, should circumvent possible tampering of witnesses during witness preparation. However, as noted by the International Bar Association, what is most important is that a court-wide approach as regards witness proofing/preparation and familiarisation is adopted for all cases (i.e. by a judges plenary),[193] since currently, depending on the case and the Chamber, the ICC practice is conflicting.

Moreover, other measures may be necessary, particularly as regards child witnesses, in order to make their testimony reliable and trustworthy for the effects of an Article 74 judgment, but also in order to avoid re-traumatisation of the child witness. In this regard, the CRC Committee has recommended that questioning be made in a conversation-like format rather than a one-sided examination and under conditions of confidentiality.[194] The UN Special Representative for Children and Armed Conflict in her Working Paper on Children and Justice states that it is rarely in the child's best interests to be interviewed on repeated occasions and interviews should be kept to a minimum and should be conducted only by trained professionals.[195] This is also recommended by the UN Guidelines that state that the number of interviews should be limited and special procedures should be established in order to collect evidence from child victims and witnesses and in order to reduce "unnecessary contact with the justice process".[196]

However, so far in ICC proceedings child witnesses have been subject to thorough examination and cross-examination. They have also been interviewed on various occasions and after long periods of time.[197] This practice should be avoided, particularly regarding child witnesses who may be re-victimised by such an interaction with the ICC. Also, as stated in the UN Guidelines, there should be continuity in the contact between child victims and professionals (*i.e.* investigators) and trials involving child victims and witnesses should be expedited.[198] If there is a long period of time between the initial interviews

193 International Bar Association, *Witnesses before the International Criminal Court*, July 2013, page 24.

194 CRC Committee, *General Comment No. 12 (2009): The right of the child to be heard* (20 July 2009) CRC/C/GC/12, para. 43.

195 UN Office of the Special Representative of the Secretary-General for Children Affected by Armed Conflict, *Children and Justice During and in the Aftermath of Armed Conflict* (September 2011) 15. See also Beijer and Liefaard, 'A Bermuda Triangle? Balancing protection, participation and proof in criminal proceedings affecting child victims and witnesses' (2011) *Utrecht Law Review*, 76.

196 UN Guidelines, para. 31. See also Paris Principles, principle 7.28.

197 *Lubanga case* 'Judgment pursuant to Article 74 of the Rome Statute' Separate and Dissenting opinion of Judge Odio Benito'(14 March 2012) ICC-01/04-01/06-2842, para. 32.

198 UN Guidelines, paras 30(b) and (c).

and the actual trial in which the child witness testifies, the continuity of any relationship with the ICC staff may be difficult if not impossible.

Thus, passing of time is critical when referring to child witnesses and it is perhaps the most patent risk against their reliability.[199] Beresford has stated that although an adult's memory deteriorates, the deterioration of a child's memory is more profound. Furthermore, depending on their age and own individual development, young children may not have a sufficiently developed understanding of the concepts of truth and lies, which form the basis of criminal justice. For example, children may face difficulties in distinguishing between reality and fantasy, especially when recounting traumatic events.[200] Thus, ICC proceedings need to be reconsidered when children appear as witnesses.

If child-friendly measures are not taken, testimonies of child witnesses could simply become unreliable and thus disregarded by the Chambers. It would be regrettable to have children endure a judicial process before the ICC in vain, simply because the special circumstances of their age, development and maturity were not taken into consideration. As discussed above, this was in fact the regrettable result in the *Lubanga case*, in which child witnesses and victims were found to be unreliable by the Trial Chamber.

The European Council has established the following guidelines regarding evidence and statements by child witnesses:[201]

> '64. Interviews of and the gathering of statements from children should, as far as possible, be carried out by trained professionals. Every effort should be made for children to give evidence in the most favourable settings and under the most suitable conditions, having regard to their age, maturity and level of understanding and any communication difficulties they may have.
> 65. Audiovisual statements from children who are victims or witnesses should be encouraged, while respecting the right of other parties to contest the content of such statements.
> 66. When more than one interview is necessary, they should preferably be carried out by the same person, in order to ensure coherence of approach in the best interests of the child.
> 67. The number of interviews should be as limited as possible and their length should be adapted to the child's age and attention span.
> 68. Direct contact, confrontation or interaction between a child victim or witness with alleged perpetrators should, as far as possible, be avoided unless at the request of the child victim.

199 Beijer and Liefaard, 'A Bermuda Triangle? Balancing protection, participation and proof in criminal proceedings affecting child victims and witnesses' (2011) *Utrecht Law Review,* 94.

200 Stuart Beresford, 'Child Witnesses and the International Criminal Justice System: Does the ICC Protect the Most Vulnerable?' (2005) *Journal of International Criminal Justice* 737, 740.

201 Council of Europe: Committee of Ministers, *Guidelines of the Committee of Ministers of the Council of Europe on Child-Friendly Justice* (17 November 2010).

69. Children should have the opportunity to give evidence in criminal cases without the presence of the alleged perpetrator.
70. The existence of less strict rules on giving evidence such as absence of the requirement for oath or other similar declarations, or other child-friendly procedural measures, should not in itself diminish the value given to a child's testimony or evidence.
71. Interview protocols that take into account different stages of the child's development should be designed and implemented to underpin the validity of children's evidence. These should avoid leading questions and thereby enhance reliability.
72. With regard to the best interests and well-being of children, it should be possible for a judge to allow a child not to testify.
73. A child's statements and evidence should never be presumed invalid or untrustworthy by reason only of the child's age.
74. The possibility of taking statements of child victims and witnesses in specially designed child-friendly facilities and a child-friendly environment should be examined.'

All of the above are valuable recommendations that should be taken into consideration in ICC proceedings dealing with children, pursuant to Article 68(1) of the Statute and Rules 86 of the RPE. Bearing in mind the strenuous effects that traditional examination and cross-examination and multiple interviews could have on a child's well-being, measures such as the above could be of guidance for future ICC proceedings. After all, these measures are not only beneficial to child victims; ultimately they are beneficial to a fair trial, as it also helps to preserve child witnesses' evidence so that their testimonies are credible and reliable.

Aside from the judicial protective measures identified above, the ICC also provides witnesses and victims with non-judicial protective measures. These measures include a protection system that has been put in place in countries where the ICC has situations and also a witness relocation programme. Moreover, when the witness is giving testimony, the VWU guarantees support "24 hours a day, seven days a week to witnesses during their stay at the location of testimony" in order to attend "the psycho-social and physical well-being and the practical needs of witnesses including any special needs vulnerable witnesses may have".[202]

The Initial Response System (IRS) provides for an immediate response to direct or imminent threats to victims or witnesses in the field.[203] This system is a 24/7 emergency response system that enables the ICC to be informed at short notice of any immediate threat to victims and witnesses in order to take

202 *Ruto and Sang case,* Victims and Witnesses Unit's Amended Protocol on the practices used to familiarise witnesses for giving testimony, 25 April 2013, ICC-01/09-01/11-704-Anx, para. 44.

203 *Lubanga case* 'Submission of Redacted Documents' (Document reclassified as public, 18 March 2006) ICC-01/04-01/06-39-US-AnxD.

appropriate actions.[204] It should also be noted that the OTP has internal sections that deal with the protection of witnesses. In this regard, it has its own Protection Strategy Unit, which also deals with responsibility for security-related issues.[205]

The ICC additionally has a witness protection programme, which relocates witnesses in cases where the risk is such that such a measures becomes necessary. However, relocation should be *ultima ratio*, particularly when the individual concerned is a child, as it transfers the witness or victim and often his or her relatives to another location (in or outside his or her home country) and has a permanent character as the person can no longer return to his or her place of origin. In the *Lubanga case* however, 20 prosecution witnesses, including children, were admitted to the ICC Protection Programme.[206] Until March 2013, 199 witnesses had testified before the ICC and more than 300 individuals had been admitted into the ICC Protection Programme for their relocation.[207] The numbers above demonstrate the vast responsibilities of the VWU, but also of the ICC as a whole in respect of witnesses, victims and other persons at risk in the current 8 situations under the ICC's scrutiny.

Given the implications of permanent relocation, child victims and witnesses should be properly informed of the consequences of their involvement with the ICC, and of what an eventual relocation could entail. In the Kenya Situation, for example, a national newspaper reported that ICC witnesses were negotiating lifetime protection by the ICC.[208] This sort of misunderstanding that could lead to unjustifiable expectations of victims and witnesses should be avoided. Although the details of the ICC Protection Programme are confidential, outreach should avoid misconceptions and give the general public, and particularly victims and witnesses concerned, available information on the implications of relocation and other non-judicial protective measures available for witnesses and victims, as well as any risks that the individuals' involvement with the ICC may entail.

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204 ICC ASP, Press and Media, 'ICC Registrar participates in panel on impact of the Rome Statute system on victims and affected communities' (Press release 2 June 2010) < http://www.icc-cpi.int/en_menus/asp/reviewconference/pressreleaserc/Pages/icc%20registrar%20participates%20in%20panel%20on%20impact%20of%20the%20rome%20statute%20system%20on%20vict.aspx> accessed 8 August 2013.

205 International Bar Association, *Witnesses before the International Criminal Court*, July 2013, pages 29-30.

206 Jennifer Easterday, 'Witness Protection: Successes and Challenges in the Lubanga Trial' (*The Lubanga Trial at the International Criminal Court,* June 26 2009) <http://www.lubangatrial.org/2009/06/26/witness-protection-successes-and-challenges-in-the-lubanga-trial/> accessed 8 August 2013.

207 International Bar Association, Witnesses before the International Criminal Court, July 2013, p. 14 and 35.

208 Tom Mailiti, 'Expert: Relocation of a witness does not entail life protection by the ICC' (*The ICC Kenya Monitor*, 29 July 2011) <http://www.icckenya.org/2011/07/expert-relocation-of-a-witness-does-not-entail-life-protection-by-the-icc> accessed 8 August 2013.

5.4.3 Protection and reliability of child witnesses

Reliability of child witnesses and reliability tests due to their young age will unlikely be an issue at judicial proceedings in the ICC as it is in national jurisdictions. Young children will not be expected to come to testify before the ICC because there will presumably be other older witnesses available to testify *in lieu* of very young children. The ICC will most probably not be faced with cases in which the sole victim and witness is a small child, as is the situation in many abuse cases in national jurisdictions. Due to the passing of time between the events and the actual trial, and also due to the fact that very small children (for example under 8 years of age) are not likely to be recruited, child witnesses who come to testify before the ICC will most likely be adolescents or even adults at the time of the trial proceedings.

Thus, the issue of child witnesses' reliability is not whether they are capable to testify or not. In principle, child witnesses before the ICC will have the age and maturity to presume that they are reliable and therefore reliability tests will not be necessary. However, as any other witness appearing before a court, their reliability and trustworthiness will be tested. Nevertheless, their particular circumstances, such as age and maturity, should be taken into consideration by the judges when testing the child's reliability and credibility. Likewise, when determining the reliability of a child witness, judges should weigh their evidence bearing in mind the trauma these children could have suffered, as well as the effect that the passing of time has on children's memories.

In the SCSL *Taylor case*, the Trial Chamber took into consideration the young age of a witness at the time of the events and her apparent shyness and nervousness during testimony when evaluating her trustworthiness and reliability. The SCSL Trial Chamber considered that the witness had little education and therefore she would be able to recall events rather than numeric representations of time (*i.e.* the year in which she was captured).[209] Although the Trial Chamber in the *Taylor case* ultimately did not rely on this witness to be satisfied "beyond reasonable doubt", the above analysis is a useful example of the various aspects that need to be considered when evaluating a child witness's testimony.

Similarly, in the *Lubanga case*, Judge Odio Benito in her separate and dissenting opinion took into consideration the fact that child witnesses who are subject to multiple examinations during a long period of time logically and explicably have difficulties recollecting events. In fact, Judge Odio Benito concluded "it would be suspicious if their accounts would remain perfectly alike and unchanged".[210] Similarly to the Trial Chamber in the *Taylor case*,

209 *Taylor case* 'Judgment' (18 May 2012) SCSL 03-01-1281, paras 1398-1402.

210 *Lubanga case* 'Judgement pursuant to Article 74 of the Rome Statute' Separate and Dissenting opinion of Judge Odio Benito' (14 March 2012) ICC-01/04-01/06-2842, para. 32.

although Judge Odio Benito concluded that the children's testimony could not be used to convict the accused "beyond reasonable doubt", her analysis could allow judges to rely on child witnesses' testimonies, in spite of logical and expected contradictions that may exist in their evidence, when the overall evidence of the case supports the accounts contained in those testimonies.

5.5 Reparations to Child Victims

Article 75 of the Rome Statute is perhaps one of the most innovative provisions of the ICC framework, establishing a mechanism for reparations for the benefit of victims.[211]

This Article provides as follows:

> '1. The ICC shall establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. On this basis, in its decision the ICC may, either upon request or on its own motion in exceptional circumstances, determine the scope and extent of any damage, loss and injury to, or in respect of, victims and will state the principles on which it is acting.
> 2. The ICC may make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. Where appropriate, the ICC may order that the award for reparations be made through the Trust Fund provided for in Article 79.
> 3. Before making an order under this Article, the ICC may invite and shall take account of representations from or on behalf of the convicted person, victims, other interested persons or interested States.
> 4. In exercising its power under this Article, the ICC may, after a person is convicted of a crime within the jurisdiction of the ICC, determine whether, in order to give effect to an order which it may make under this Article, it is necessary to seek measures under Article 93, paragraph 1.
> 5. A State Party shall give effect to a decision under this Article as if the provisions of Article 109 were applicable to this Article.
> 6. Nothing in this Article shall be interpreted as prejudicing the rights of victims under national or international law.'

5.5.1 Victim beneficiary of reparations

Rule 85 of the RPE should serve as basis to define who is a victim beneficiary of reparations before the ICC, and thus the definition of the crime included in the charges, and eventually decided upon by the judges of the ICC, will have

211 Although this provision is pioneering in international criminal law, other prior instruments, namely the UN Basic Principles and case law such as the one of the IACtHR, could provide guidance for its interpretation. The applicability of these instruments is referred to in Chapter 3 of this research.

a bearing on whether specific individuals or groups of persons are considered as beneficiaries of reparations.[212]

Although the criteria established by the ICC case law so far regarding identification matters, indirect and direct victims, the *prima facie* evidentiary threshold, etc., could be applied to reparations proceedings, it should be noted that these reparations have a distinct nature, as they occur when there has been a conviction against an individual. Moreover, while in pre-trial and trial proceedings victims have to demonstrate that they have an interest in the case, in reparations proceedings this interest is presumed. The victims, however, will require proving the harm suffered as a consequence of the crime for which an individual has been convicted, albeit with a lower evidentiary threshold, such as balance of probabilities or even presumptions.

Reparations can be made in favour of victims either individually or collectively. Taking into consideration that the ICC will be unable to identify each and every child victim of a given crime for which an individual is convicted, collective reparations appear to be more recommendable due to the often-generalised nature of the crimes of genocide, crimes against humanity and war crimes. For example, in the first case before the ICC, which involves crimes of enlistment, conscription and use of child soldiers, individual reparations could even be detrimental to the victims, who could be further stigmatised vis-à-vis their communities. In fact, it has been recommended that the ICC awards individual reparations solely when the accused has assets that have been seized, there is a link between the accused and a particular group of victims, and the case concerns a limited and definable group of victims.[213] So far no pending case before the ICC seems to fulfil the above requirements.

However, safeguards should be put in place when implementing collective reparations, particularly because they could reflect patronising attitudes or replace humanitarian or developmental projects, which should be distinct from reparations mechanisms. As stated above, prior consultations with victims, for example via the TFV, as to what they expect of reparations, could be beneficial.[214] Most importantly, collective reparations should always aim to

212 The relationship between the definition of the substantive law and its implication in reparations is touched upon in Chapter 3 of this research.

213 P De Grieff and W Marieke, 'The Trust Fund for Victims of the ICC: Between Possibilities and Constraints' in M Boossuyt and others (eds) *Out of the Ashes: Reparations for Victims of Gross and Systematic Human Rights Violations* (Intersentia 2006).

214 Guatemalan Commission for Historical Clarification, *Guatemala Memory of Silence: Report of the Commission for Historical Clarification, Conclusions and Recommendations* < http://shr.aaas.org/projects/human_rights/guatemala/ceh/mos_en.pdf> accessed 8 August 2013. The Commission stated that participation of the Guatemalan society was vital in the definition, execution and evaluation of the National Reparation Programme, and that in the particular case of collective reparations, it was essential *"that the beneficiaries themselves participate in defining the priorities of the reparation process"* (page 51).

have an individual component, which could finally include monetary compensation or rehabilitation that benefits individual victims.[215]

Finally, referring to child victims, collective reparations should pay special attention to children within the group that will benefit from reparations. Within the group of "children", particular consideration must be given to girls, who often will suffer differently from the crime or have different access to reparations because of gender-specific social and cultural rules. For example, as stated in the Paris Principles, measures should be taken so that girls are not made invisible during the reparations process. Likewise, the particular situation of children who are refugee or internally displaced should also be considered.[216]

Most importantly, victims should be consulted whenever a collective reparations scheme is to be implemented. In fact, the ICC has recognised the importance of victims' involvement in their own reparations.[217] Three advantages of consulting with victims can be identified. Firstly, the ICC could know the victims' real needs and the priorities that victims and their communities may have (including the needs of child victims pursuant to Rule 86 of the RPE). Moreover, consultation also gives victims a sense of ownership, as they are able to define and implement reparations. Finally, it also has a healing effect, as victims are treated with dignity and it helps them to move forward.[218]

5.5.2 Types of reparations and harms

Article 75 of the Rome Statute provides for at least three types of reparations: restitution, compensation and rehabilitation. However, in addition to these, other modalities of reparations could be applicable for child victims of crimes within the jurisdiction of the ICC.

5.5.2.1 Restitution

Restitution is an "ideal" type of reparation, because it takes the victim back to how things were prior to the commission of the crime.[219] The UN Basic

215 C Tomuschat, 'Individual Reparation Claims in Instances of Grave Human Rights Violations: The Position under General International Law' in: A Randelzhofer and C Tomuschat (eds) *State Responsibility and the Individual: Reparation in Instances of Grave Violations of Human Rights* (Kluwer Law International 1999) 20.

216 Paris Principles, principles 4 and 5.

217 ICC Assembly of State Parties, *The impact of the Rome Statute system on victims and affected communities* (Adopted 8 June 2010) RC/Res.2, para. 4.

218 Maria Suchkova, *The Importance of a Participatory Reparations Process and its Relationship to the Principles of Reparation* (University of Essex, Transitional Justice Network, Reparations Unit, Briefing Paper No. 5, 2011) 2.

219 See also Permanent Court of International Justice, *Case of the Factory at Chozow*, Judgment on the Merits, Series A No 17 1928 para. 21.

Principles define it as the possibility to restore the victim to the original situation before the crime. It includes, as appropriate: restoration of liberty, enjoyment of human rights, identity, family life and citizenship, return to one's place of residence, restoration of employment and return of property.[220] However, in reality restitution is very often impossible, particularly as regards children, since the passing of time between the commission of the crime and the reparations may make it impossible to restore the child's life to how it was prior to the crime.[221] In fact, for many (if not all) victims of crimes within the jurisdiction of the ICC, their childhood is permanently affected by these crimes and thus restitution seems unattainable.

Likewise, restitution should be applied with caution, as the victim should not go back to a previous situation of discrimination or violation of rights. For example, in cases involving child victims, if the child was already suffering from lack of education or proper nutrition, restitution should not just "place" the child in his or her previous precarious condition. This is particularly important for girls, who may be in a situation of disadvantage prior to the crime and should not be returned to this situation as part of restitution mechanisms. Restitution should therefore aim to rectify any discriminatory situation that existed prior to the crime.[222] However, the ICC may not have the mandate nor the resources to "rectify" such injustices. But at least, as noted by the Trial Chamber in the *Lubanga case*, reparations "need to address any underlying injustices and in their implementation the Court *should avoid* replicating discriminatory practices or structures that predated the commission of the crimes" (emphasis added).[223]

5.5.2.2 Compensation

Another type of reparation for victims of crimes within the ICC is that of compensation. Because often restitution is simply impossible (*i.e.* restitution of a deceased parent or because restitution of a life in a place that has been destroyed by armed conflict is impossible), compensation attempts to pay the victim for the harm he or she suffered as a result of a crime (either in cash or by other means).

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220 UNGA, *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law: resolution adopted by the General Assembly* (UN Basic Principles) (21 March 2006) A/RES/60/147, principle 19.

221 McCarthy notes that although restitution plays a significant role in the reparation awards of international human rights courts, the limitations of the concept have been recognised. Conor McCarthy, Reparations and Victim Support under the Rome Statute of the International Criminal Court, Doctoral dissertation, (University of Cambridge 2011), page 138.

222 *Cotton Field case,* Preliminary Objection Merits Reparations and Costs, Judgment of November 16, 2009 Series C No 205 para. 450.

223 *Lubanga case* 'Decision establishing the principles and procedures to be applied to reparations' (7 August 2012) ICC-01/04-01/06-2904, para. 192.

The UN Basic Principles have defined compensation as the payment for any economically assessable damage, as appropriate and proportional to the gravity of the violation and the circumstances of each case.[224] The IACtHR has determined that compensation aims at ensuring full or partial reparation for the damage suffered, as long as the damage is financially assessable. Compensation is thus a substitute to make up for a loss or damage that cannot be restored as such.[225]

The UN Basic Principles establish the following possible harms to be economically assessable: a) physical or mental harm; b) lost opportunities, including employment, education and social benefits; c) material damages and loss of earnings, including loss of earning potential; d) moral damage; e) costs required for legal or expert assistance, medicine, medical services and psychological and social services.[226] Moreover, in accordance with the ICC Appeals Chamber all forms of harm should be "personally" suffered by the victim, be it directly or indirectly.[227]

However, judicial determination of these harms and their eventual monetary assessment may be a complex task. Accordingly, Rule 97 of the RPE provides the Chamber with the possibility to call upon experts in order to determine the scope and extent of any damage, loss or injury and to suggest options concerning the appropriate types and modalities of reparations.

Moreover, as noted in Chapter 3 of this research, the case law of the IACtHR could be of guidance for ICC when it has to determine the harm suffered and its subsequent compensation. For example, the IACtHR has determined that moral damage includes emotional problems (such as intrusive images and thoughts, slowing of thought or concentration process, memory dysfunction), mental problems (such as anxiety, fear, anguish, anger, depression), as well as the physical reactions to these problems (aches, pains, sleep problems, heart disease, etc.). The IACtHR has also affirmed that moral damage may be a sequel to a physical injury, but it may also occur on its own.[228] The IACtHR has also developed the concept of "damage to a life plan", which could be of guidance in cases involving child victims. The IACtHR has defined this concept as a full self-realisation of the person concerned, taking into account his or her calling in life, particular circumstances, potentialities, ambitions, thus permitting to set for oneself, in a reasonable manner, specific goals.[229] For example a child

224 UN Basic Principles, principle 20.

225 *Velásquez-Rodríguez case,* Reparations and Costs, Judgment of July 21, 1989 Series C No 7 para. 26.

226 UN Basic Principles, principle 20.

227 *Lubanga case* 'Judgment on the appeals of The Prosecutor and The Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008' (11 July 2008) ICC-01/04-01/06-1432, para. 1.

228 *Blake case,* Reparations and Costs, Judgment of January 22, 1999 Series C No 48.

229 *Loayza-Tamayo case,* Reparations and Costs, Judgment of November 27, 1998 Series C No 42 para. 147.

victim of recruitment in an armed group could have his or her life plan obstructed by lost years of schooling, unwanted pregnancies or illnesses. Thus, compensation should not only respond to the harm directly suffered by the crime but also to the effects that committing this crime had on the future life of the child victim. For example, when a child victim has suffered from a crime of sexual violence this crime may result not only in physical injuries but also in moral damages. Furthermore, depending on whether the victim is a boy or a girl, or depending on other socio-economic and cultural factors, there could be distinct harms (for example particular health problems) that should be individually addressed.

As noted above, compensation pays victims for the harms suffered, often with money, although other means of payment (*i.e.* a vehicle, housing, etc) may be foreseeable. As regards children, payment of lump sums may not be ideal.[230] Moreover, even if payments are made to child victims, they should always be accompanied by other measures, such as rehabilitation and reintegration programmes, which will enable the victim not only to make better use of the sums received, but also to reintegrate into society.[231]

5.5.2.3 Rehabilitation

The Rome Statute foresees a third mode of reparation, which is rehabilitation. This type of reparation aims to restore the victim's well-being and health and encompasses medical and psychological care as well as legal and social services.[232] Shelton has defined rehabilitation as a process towards the restoration of the victim's full wellbeing, in order to restore what was lost and to prevent further deterioration of the victim's health (both mental and physical).[233]

Rehabilitation is particularly important for child victims, because children will often (if not always) need psychological treatment and other healing processes after they suffered crimes of such gravity as those under the jurisdiction of the ICC. Ideally, reparations should address the individual child (physically and mentally), through a combination of psychosocial support,

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230 Particularly former child soldiers, as such compensation could send a confusing and wrong message to the community and other child victims that "perpetrators" are being awarded and it may not benefit towards the reconciliation and reintegration of the individual child victim with his or her family and community. See: ICTJ, *Through a New Lens: A Child-Sensitive Approach to Transitional Justice* (August 2011) 29-30.

231 In this sense, the Trial Chamber in the *Lubanga case* concluded that reparations should secure reconciliation, whenever possible. See: *Lubanga case* 'Decision establishing the principles and procedures to be applied to reparations' (7 August 2012) ICC-01/04-01/06-2904, para. 194.

232 *UN Basic Principles*, principle 21.

233 D Shelton, *Remedies in International Human Rights Law* (Oxford University Press 1999) 302-303.

health services and education/training to make up for lost opportunities.[234] In fact, Article 39 of the CRC states that there is a need for "physical and psychological recovery and social reintegration of a child victim". Furthermore, rehabilitation may very often be a necessary pre-requisite for the child victim's enjoyment of any restitution or compensation received. In the *Lubanga case*, the expert witness on child trauma stated that when war-related psychological problems of child victims and other civilians remain untreated, the opportunity to initiate a substantial economic development and an increase in the standard of living might be substantially reduced.[235] As the same expert witness in the *Lubanga case* stated, if no rehabilitation is provided, the cycle of violence could affect future generations.[236]

Measures of restorative justice, in which child victims of recruitment could assume responsibility for any crimes they committed as a result of their recruitment, should also be taken. For example, it has been suggested that former child soldiers could participate in other forms of accountability beyond the purely criminal or judicial forms.[237] Experiences such as those of Sierra Leone, in which efforts were made to activate traditional mechanisms of reconciliation that included all members of the communities affected by the armed conflict, including formerly recruited children, could be applicable to ICC reparations proceedings.[238] Education programmes could also be beneficial to break the cycle of historic violence.[239] For example, the Paris Principles establish in this regard that it is important to create capacity building within the community in order to prevent crimes committed against children (particularly child recruitment) and support their release and reintegration. The Paris Principles emphasise that the community should be involved in planning programmes so that the community may take care of the demobilised children and prevent their future association with armed groups.[240]

However, the ICC's mandate and particularly the limited funds available for ICC reparations thus far may limit its ability to carry out the various tasks involved in the rehabilitation and reintegration of child victims of international

234 ICTJ, *Through a New Lens: A Child-Sensitive Approach to Transitional Justice* (August 2011) 29, 31.

235 Elisabeth Schauer, *The Psychological Impact of Child Soldiering*, (Report of Ms. Elisabeth Schauer following the 6 February 2009 "Instructions to the Court's expert on child soldiers and trauma" ICC-01/04-01/06-1729-Anx1, 25 of February 2009) 33.

236 Elisabeth Schauer, *The Psychological Impact of Child Soldiering*, (Report of Ms. Elisabeth Schauer following the 6 February 2009 "Instructions to the Court's expert on child soldiers and trauma" ICC-01/04-01/06-1729-Anx1, 25 of February 2009) 25-27 and 34.

237 I Derlyun and others, *Re-Member, Rehabilitation, Reintegration and Reconciliation of War-Affected Children* (Intersentia 2012) 28.

238 I Derlyun and others, *Re-Member, Rehabilitation, Reintegration and Reconciliation of War-Affected Children* (Intersentia 2012) 69-71.

239 ICTJ, *Through a New Lens: A Child-Sensitive Approach to Transitional Justice* (August 2011) 34.

240 Paris Principles, principles 3.21 and 3.22.

crimes. In this regard, the cooperation of other international and domestic organisations (including inter-governmental and non-governmental) is essential as clearly this goes beyond the ICC's sole responsibility as an international criminal jurisdiction.

5.5.3.5 Other types of reparation

Aside from the three forms of reparations identified above, there are other types of reparations that have been applied in other international jurisdictions, albeit not dealing with individual criminal responsibility but with State responsibility. For example, measures such as public apologies, satisfaction and guarantee of non-repetition could also be foreseeable before the ICC, if adapted to this particular international jurisdiction.

These measures could be beneficial as very often they do not require numerous resources, but nevertheless have an important symbolic value for victims. For example, in case of a public apology, the convicted person could voluntarily decide to issue a public apology towards his/her victims. Although ICC judges cannot order this, a voluntary public apology could be taken into account as a mitigating factor for sentencing purposes.[241]

In what refers to satisfaction and guarantees of non-repetition, this would most likely entail the participation of a State, which assumes responsibility for the crimes committed. This of course goes beyond the scope of the ICC's jurisdiction. However, States could be involved in reparations, such as the construction of a memorial or the establishment of a day of remembrance for the victims of a crime, insofar as States agree to do this pursuant to Article 93 of the Rome Statute.[242] Again, although ICC judges cannot order this, at least theoretically this is a possibility. Moreover, this could be a possibility in future cases where the jurisdiction of the ICC and a regional human rights court could coincide in a given situation.[243]

Particularly in what refers to crimes of child recruitment, a possible type of reparation would be to implement a transitional justice mechanism in which children (who often have the dual status of victim and perpetrator) come to

241 David Donat-Cattin in Otto Triffterer (ed), *Commentary on the Rome Statute of the ICC: Observers' Notes, Article by Article* (2nd Edn), Nomos Verlagsgesellschaft 2008), page 1405.

242 Symbolic reparations have been compared to "transitional objects" that children use as vehicles for developmental changes (i.e. a blanket or a teddy bear). In the same way, it is argued that symbolic reparations are objects that assist in bridging gaps between the interpersonal world and the social world of victims. See for example Brandon Hamber, 'Narrowing the Micro and Macro' in: Pablo De Grieff (ed) *The Handbook of Reparations* (Oxford University Press 2006) 570.

243 For example, in the ECCC, victims have requested that apologies made during trial be recorded and published as a form of satisfaction. See: Redress, *Justice for Victims: The ICC's Reparations Mandate* (May 2011) 13.

terms with any crimes they have committed.[244] As child victims, particularly former child soldiers, could also have perpetrated crimes, the establishment of truth commissions may be a useful tool in dealing with children who have participated in the commission of crimes.[245] As mentioned by the Special Representative, most child victims of armed conflict will not testify as witnesses or participate as victims in ICC proceedings. She therefore has suggested that non-judicial mechanisms could provide immediate accountability, enable community reconciliation, provide reparations for losses and harms suffered and allow children to move on with their lives.[246] However, such far-reaching reparation programmes should ideally be implemented by the ICC TFV with other international and local actors, as these would clearly go beyond the ICC's judicial mandate and jurisdiction and would require the local and international expertise and resources (*i.e.* of the UN Special Representative on Children and Armed Conflict and other stakeholders).

5.5.3 Principles on reparations

Although Article 75 of the Rome Statute is included in the section dealing with "The Trial", all paragraphs of this provision refer to "the Court" and not to the "Trial Chamber". Therefore, one could interpret that reparations proceedings are not limited to the trial stage and that reparations are not to be exclusively decided by the Trial Chamber. However, as Article 75 refers to "convicted person" it is only logical to interpret that reparations under this provision may only be ordered if the person concerned is convicted. In fact, to implement reparation orders one could even interpret that the Appeals Chamber must first confirm the conviction against a person.

During the first years of the ICC, there was also contention in regards to who shall be "the Court" under Article 75 of the Rome Statute.[247] Paragraph

244 The Special Representative of the UN on Children and Armed Conflict has recommended that children are included in truth-telling, traditional healing ceremonies and reintegration programmes. See: UN Office of the Special Representative of the Secretary-General for Children Affected by Armed Conflict, *Children and Justice During and in the Aftermath of Armed Conflict* (September 2011) 10.

245 ICTJ, *Through a New Lens: A Child-Sensitive Approach to Transitional Justice* (August 2011) 25.

246 UN Office of the Special Representative of the Secretary-General for Children Affected by Armed Conflict, *Children and Justice During and in the Aftermath of Armed Conflict* (September 2011) 20.

247 For example, the ICC's Registry foresees the possibility of a single judge taking charge of reparations. See: *Lubanga case* 'Second Report of the Registry on Reparations' (1 September 2011) ICC-01/04-01/06-2806 paras 152-155. This possibility is contended by the OPCV of the ICC, which considers that this should be decided by the three judges of the Trial Chamber. See: *Lubanga case* 'Observations on issues concerning reparations' (18 April 2012) ICC-01/04-01/06-2863 paras 129-130. See also: Redress, *Justice for Victims: The ICC's Reparations Mandate* (May 2011) 47-48.

1 of Article 75 of the Rome Statute states that the ICC must establish principles on reparations. Many have argued that the principles should be adopted as a court-wide instrument at the outset of the ICC's creation.[248] However, the ICC did not adopt such general principles and in December 2011, the ASP decided that the relevant Trial Chamber should decide about these principles on a case-by-case basis.[249]

Because ICC principles are thus case-specific and not court-wide, they need to be tailored to the particular needs of victims in a given case. The first case before the ICC that dealt with reparations was the *Lubanga case*. Since this case involves child victims, particularly former child soldiers, the principles adopted in this case dealt with child victims. However, the general principles adopted by the Trial Chamber, although case specific, also contain principles that are of application for all cases before the ICC, and thus set an important precedent for future reparations decisions in other cases.

In the *Lubanga case*, reparations proceedings were initiated and the Chamber heard submissions from the parties and participants in the proceedings, but also from organisations that requested leave to participate.[250] Among the organisations that were granted leave, UNICEF submitted its observations on the reparations proceedings.[251] On 7 August 2012, the Trial Chamber rendered the ICC's first-ever decision establishing principles and a preliminary procedure for reparations before the ICC in that case.[252]

The Trial Chamber in the *Lubanga case* determined that in reparations decisions concerning children, the ICC should be guided by the CRC and the

248 Redress, *Justice for Victims: The ICC's Reparations Mandate* (May 2011) 24; Victims' Rights Working Group, *Establishing effective reparation procedures and principles for the ICC* (September 2011); Octavio Amezcua-Noriega, *Reparation Principles under International Law and their Possible Application by the ICC: Some Reflections* (University of Essex, Transitional Justice Network, Reparations Unit, Briefing Paper No. 1, 2011) 2.

249 ICC Assembly of States Parties, *Reparations* (adopted on 20 December 2011) ICC-ASP/10/Res.3

250 *Lubanga case* 'Scheduling order concerning timetable for sentencing and reparations' (14 March 2012) ICC-01/04-01/06-2844; 'Women's Initiatives for Gender Justice request for leave to participate in reparations proceedings' (28 March 2012) ICC-01/04-01/06-2853; 'Request for leave to file submission on reparation issues' (28 March 2012) ICC-01/04-01/06-2854; 'Registry transmission of communications received in the context of reparations proceedings' (29 March 2012) ICC-01/04-01/06-2855 with public Annexes 1-3; 'Decision granting leave to make representations in the reparations proceedings' (20 April 2012) ICC-01/04-01/06-2870.

251 *Lubanga case* 'Submission on the principles to be applied, and the procedure to be followed by the Chamber with regard to reparations' (10 May 2012) ICC-01/04-01/06-2878.

252 *Lubanga case* 'Decision establishing the principles and procedures to be applied to reparations' (7 August 2012) ICC-01/04-01/06-2904. This decision is currently pending before the Appeals Chamber. See: *Lubanga case*, Decision on the Presiding Judge of the Appeals Chamber in the appeal of Mr Thomas Lubanga Dyilo filed on 6 September 2012 against the decision of Trial Chamber I entitled "Decision establishing the principles and procedures to be applied to reparations" (11 September 2012) ICC-01/04-01/06-2920.

fundamental principle of the best interests of the child that is enshrined therein.[253] It also concluded that reparations should be "gender-inclusive"[254] and that the differentiated effect that crimes have upon girls and boys should also be taken into account when deciding on reparations.[255] The Trial Chamber also directed that child victims should be informed about reparations procedures and programmes in a manner that is comprehensible for victims and those acting on their behalf.[256] Applying Article 12 of the CRC, the Trial Chamber also determined that the views of child victims are to be considered when decisions are made about reparations that concern them.[257] It is also important to note that the Trial Chamber used various human rights instruments as guidance to adopt these reparations proceedings, including "soft law" instruments. For example, it referred to the UN Basic Principles, the Paris

253 The UN Guidelines, referred to by Trial Chamber I in their decision establishing the principles on reparations, include a wide array of principles. Although the Trial Chamber did not mention all of them, these could be included in future reparations principles: (a) Dignity. Every child is a unique and valuable human being and as such his or her individual dignity, special needs, interests and privacy should be respected and protected; (b) Non-discrimination. Every child has the right to be treated fairly and equally, regardless of his or her or the parent's or legal guardian's race, ethnicity, colour, gender, language, religion, political or other opinion, national, ethnic or social origin, property, disability and birth or other status; (c) Best interests of the child. While the rights of accused and convicted offenders should be safeguarded, every child has the right to have his or her best interests given primary consideration. This includes the right to protection and to a chance for harmonious development: (i) Protection. Every child has the right to life and survival and to be shielded from any form of hardship, abuse or neglect, including physical, psychological, mental and emotional abuse and neglect; (ii) Harmonious development. Every child has the right to a chance for harmonious development and to a standard of living adequate for physical, mental, spiritual, moral and social growth. In the case of a child who has been traumatised, every step should be taken to enable the child to enjoy healthy development; (d) Right to participation. Every child has, subject to national procedural law, the right to express his or her views, opinions and beliefs freely, in his or her own words, and to contribute especially to the decisions affecting his or her life, including those taken in any judicial processes, and to have those views taken into consideration according to his or her abilities, age, intellectual maturity and evolving capacity. See: UN Guidelines, para. 8.

254 In what refers to girls in particular, the Nairobi Declaration on Women's Rights to a Remedy and Reparation ("Nairobi Declaration") also guided the Trial Chamber in the the adoption of its principles. The Nairobi Declaration proclaims that reparations must drive post-conflict transformation of socio-cultural injustices, and political and structural inequalities that share the lives of girls. In that sense, the Nairobi Declaration foresees the use of affirmative measures to redress inequalities that existed prior to the commitment of the crime. It also states that reparations processes must overcome customary and religious laws and practices that prevent girls from making decisions on their lives. See: Nairobi Declaration on Women's and Girls' Right to a Remedy and Reparation (Adopted at the International Meeting on Women's and Girls' Right to a Remedy and Reparation, March 2007).

255 *Lubanga case* 'Decision establishing the principles and procedures to be applied to reparations' (7 August 2012) ICC-01/04-01/06-2904, paras 210 – 211.

256 *Lubanga case* 'Decision establishing the principles and procedures to be applied to reparations' (7 August 2012) ICC-01/04-01/06-2904, para. 214.

257 *Lubanga case* 'Decision establishing the principles and procedures to be applied to reparations' (7 August 2012) ICC-01/04-01/06-2904, para. 215.

Principles, among others. The Chamber also stated that UN Reports on the subject of reparations, as well as the jurisprudence of the regional courts of human rights, had further provided guidance to the Chamber.[258]

Reparations proceedings are currently suspended due to the pending appeal, however, once these proceedings resume, it will be up to the TFV, along with the Registry of the ICC, to implement these general guidelines adopted by the Trial Chamber in future reparations programmes.

5.5.4 Reparations proceedings

As stated before, orders for reparations can only be made once a Trial Chamber has entered a conviction. To date, reparations proceedings have only started in the *Lubanga case*. Although in the *Lubanga case* the Trial Chamber continued hearing the reparations proceedings upon entering a conviction, some have also referred to the possibility of having a "single judge" assigned for this task.[259] However, under Article 39(2) of the Rome Statute, three judges should carry out the functions of the Trial Chamber.[260] The Trial Chamber in the *Lubanga case* nonetheless determined that other judges could replace the three judges of the original Trial Chamber, particularly since their mandate as judges came to an end.[261] This and other matters are currently pending before the Appeals Chamber.

Article 76 of the Rome Statute provides that the Trial Chamber can hold a separate reparations hearing if it decides to hear sentencing separately. To the contrary, if a Trial Chamber decides on conviction and sentencing in one hearing, one could also interpret that reparations would also be heard in that same hearing. In the ICC's first trial, the judges decided that they would hold a sentencing hearing separately.[262] However, the Trial Chamber admitted that evidence relating to reparations could be presented during the trial pursuant to Regulation 56 of the RoC.[263] Nonetheless, in future trials it could be logical and favourable to the expeditiousness of trials if a Trial Chamber would hear evidence for all three aspects in one "hearing": a) innocence or guilt; b) sentencing; and c) reparations. Consequently, the Trial Chamber could issue one single decision on these three aspects, pursuant to Articles 74, 75

258 *Lubanga case* 'Decision establishing the principles and procedures to be applied to reparations' (7 August 2012) ICC-01/04-01/06-2904, paras 185-186.

259 Victims' Rights Working Group, *A victims' perspective: Composition of the Chambers for reparation proceedings at the ICC* (April 2011).

260 Redress, *Justice for Victims: The ICC's Reparations Mandate* (May 2011) 48.

261 *Lubanga case* 'Decision establishing the principles and procedures to be applied to reparations' (7 August 2012) ICC-01/04-01/06-2904, paras 260-261.

262 *Lubanga case* Transcript of hearing (25 November 2008) ICC-01/04-01/06-T-99-ENG 39.

263 *Lubanga case,* ICC-01/04-01/06-1119, paras 119-122. See also *Bemba case,* ICC 01/05 01/08-807-Corr, para. 28.

and 76 of the Rome Statute.[264] This in fact is foreseeable, as Regulation 56 of the RoC provides that the Trial Chamber may decide to hear evidence on reparations during the main trial on the innocence or guilt of the accused.

The current ICC system foresees only individual applications for reparations.[265] However, it has been recommended that applicants be granted the possibility to collectively request reparations.[266] In fact this is only logical because Rule 97 of the RPE foresees the possibility that the ICC may award reparations on an individualised or collective basis. Therefore, it would be recommendable for the ICC to develop a mechanism to request and receive collective reparations. Another foreseeable method would be to have no application forms at all, for example if a community-based approach is adopted. This in fact is what the TFV suggested for reparations in the *Lubanga case*, so that the communities affected by the armed conflict receive benefits and therefore reparations processes do not ignite further stigmatisation or rivalries.[267] This approach was endorsed by the Trial Chamber, although, as noted above, this procedure has been suspended pending the Appeals Chamber decision on the matter.[268]

Article 75 of the Rome Statute foresees two manners in which the ICC could order reparations. Firstly, the ICC could make an order directly against a convicted person; that is a convicted person with assets or properties that could be used for reparations. However, in cases in which the accused person is indigent or his or her assets have been depleted by costly and long trials, such orders could become implausible. These reparation orders also require that reparations are paid or given directly to the victim by the Chamber (either individually or collectively identified) or "in respect of victims", for example to relatives or successors.[269] In fact, in the *Lubanga case*, the TFV suggested that when there are limited assets, the reparations process should not become

264 See for example Redress, *Justice for Victims: The ICC's Reparations Mandate* (May 2011) 46.

265 Victims can request reparations by way of a written application. Although there is a standard application form that was created pursuant to Regulation 88 of the RoC, its use is not compulsory. The above, according to Rule 94 of the RPE, triggers the "procedure upon request". Likewise, pursuant to Rule 95 of the RPE the Chamber could initiate a "procedure on the motion of the ICC", in which the Registrar is instructed to provide notification of the reparations proceedings to interested victims, persons and states so they submit a written application pursuant to Rule 94 of the RPE. In regards to this duty to notify victims, the outreach carried out by the Registry, as analysed in the first section of this chapter, is essential because victims will not be in a position to apply for reparations unless they are informed of this possibility.

266 Redress, *Justice for Victims: The ICC's Reparations Mandate* (May 2011) 38.

267 *Lubanga case* 'Observations on Reparations in Response to the Scheduling Order of 14 March 2012' (25 April 2012) ICC-01/04-01/06-2872 para. 103

268 *Lubanga case* 'Decision establishing the principles and procedures to be applied to reparations' (7 August 2012) ICC-01/04-01/06-2904, para. 274.

269 Redress, *Justice for Victims: The ICC's Reparations Mandate* (May 2011) 16.

more costly than the actual award to be granted to victims.[270] Thus, reparations of this nature should only be ordered where there are sufficient funds available, proportional to the cost that the reparations process would entail.

A second option is for the ICC to order that the award of reparations be made "through the Trust Fund". In this case the Chamber could order that money and other property collected through fines and forfeitures against the convicted person be transferred to the TFV so that it could then give it to the victims accordingly.[271] However, it is to be noted that the TFV is an independent entity of the ICC and there is no direct connection between the TFV and the organs of the ICC, and no provision in the Rome Statute empowers the ICC to manage the TFV.[272]

Rule 98(2) of the RPE foresees that reparations be made through the TFV "where at the time of making the order it is impossible or impracticable to make individual awards directly to each victim". As stated by the TFV, this mandate of the TFV allows it to transform court-ordered reparations into credible and tangible forms of redress for victims of crimes adjudicated by the ICC. The TFV thus acts as a financial administrator, managing the resources collected through fines or forfeiture or awards for reparations.[273] In accordance with Regulation 43 of the RTFV, the Board of Directors may determine the use of resources transferred to the TFV in accordance with an order of the ICC. Pursuant to Regulation 46 of the RTFV, resources collected through awards for reparations may only benefit victims defined under Rule 85 of the RPE, and, where natural persons are concerned, their families, directly or indirectly affected by the crimes committed by the convicted person. Pursuant to the RTFV, orders made through the TFV can be individual, collective or in relation to an organisation.[274] In accordance with the RTFV, when the ICC orders that reparations be made through the TFV, the Secretariat will prepare a draft implementation plan, to be approved by the Board of Directors of the TFV. The TFV will then progressively submit to the relevant Chamber the draft plan and any progress made in its implementation.[275] It is important to note that

270 *Lubanga case* 'Public Redacted Version of the ICC-01/04-01/06-2803-Conf-Exp–Trust Fund for Victims' First Report on Reparations' (23 March 2012) ICC-01/04-01/06-2803-Red, paras 270 and 363.

271 See also Rule 218 of the RPE that foresees that reparations of a financial nature be deposited with the TFV.

272 T Ingadottir, 'The Trust Fund for Victims (Article 79 of the Rome Statute)' in: T Ingadottir (ed), *The International Criminal Court: Recommendations on Policy and Practice. Financing, Victims, Judges and Immunities* (Transnational Publishers 2003) 114.

273 TFV, 'Trust Fund for Victims welcomes first ICC reparations decision, ready to engage' <http://trustfundforvictims.org/news/reparations-mandate-trust-fund-victims> accessed 8 August 2013.

274 RTFV, regulations 59-75.

275 RTFV, regulations 54-58.

the RTFV also foresees consultation with victims, experts and organisations, in order to decide on the implementation of an award for reparations.[276]

However, when the convicted person is indigent, it appears that the Trial Chamber could only make a decision establishing the harms suffered by victims and make recommendations to the TFV. The TFV could then grant them reparations with its own resources (TFV's second mandate that will be analysed below). Since the TFV is an autonomous entity with its own budget, it would seem implausible for a Chamber to "order" the TFV to implement a reparations order if there are no resources coming from the convicted person.[277] Another possibility for cases with an indigent convicted person would be for the Chamber to order non-financial reparations, such as symbolic reparations (*i.e.* the IACtHR has established that translation of the main parts of the judgment into the local language of the victims is a form of reparation).[278] However, this issue is currently pending before the Appeals Chamber, which hopefully will clarify the position of the TFV vis-à-vis other organs of the ICC, and particularly its financial autonomy.

As noted above, the TFV also has a separate mandate specified in Rule 98(5) of the RPE where "other resources of the TFV may be used for the benefits of victims". The TFV currently has 34 projects under this mandate, giving assistance to victims by means of physical rehabilitation, psychological rehabilitation and material support.[279] These projects, however, are independent from any judicial determination on the innocence or guilt of an individual.

Although the implementation reparations are still to be seen at the ICC, it is important that these take into consideration the child-oriented principles adopted by the Trial Chamber in the *Lubanga case*.

In addition to the adopted principles, other international instruments, such as the ones mentioned by Trial Chamber I in their decision, could also be of guidance for the implementation of reparations programmes. For example, the UN Model Law provides specific recommendations for restorative justice programmes, which could be applicable to ICC reparations proceedings.[280]

276 RTFV, regulations 69-71.

277 T Ingadottir,'The Trust Fund for Victims (Article 79 of the Rome Statute)' in: T Ingadottir (ed), *The International Criminal Court: Recommendations on Policy and Practice. Financing, Victims, Judges and Immunities* (Transnational Publishers 2003) 114.

278 *Plan de Sánchez case,* Reparations and Costs, Judgment of November 19, 2004 Series C No116, 68.

279 TFV, 'The two roles of the TFV: Reparations and General Assistance' <http://trustfundforvictims.org/two-roles-tfv> accessed 8 August 2013.

280 ICC reparations proceedings could have the following characteristics: a) be a flexible response to circumstances of the crime; b) be a response to the crime that respects the dignity and equality of each person, builds understanding and promotes social harmony through healing of victims, offenders and communities; c) be an approach that can be used in conjunction with traditional justice processes and sanctions; d) be an approach that incorporates problem-solving and addresses the underlying causes of conflict; e) be an approach that addresses the damages and needs of victims; and f) be a response that

Likewise, as stated by Trial Chamber I in its decision, there is a need to implement gender-specificity in reparations, as girls may have particular needs or face gender-specific obstacles to access reparations programmes.

Moreover, reparations also need to take into consideration the time elapsed from the commission of the crimes to the implementation of reparations. Likewise, it should be considered that child victims could now be young adults, so reparations foreseen for children (access to formal education) may be unviable or futile. In this regard, the appeals procedure could be simplified so that appeals on reparations are resolved expeditiously.[281]

In summary, reparations for child victims must empower and build the capacities of children, but also of families and communities, to address the root causes of the conflict. Reparations should thus heal and not cause harm, either to the victim or his or her community. Hence, a community-based approach as proposed by the TFV and adopted by Trial Chamber I in the *Lubanga case* is welcomed.[282]

5.5 CONCLUSIONS

With regard to the participation, protection and reparations to child victims and witnesses before the ICC, the CRC and the UN Guidelines, among other international instruments, should complement the ICC provisions discussed in this Chapter, as they could offer guidance for their interpretation and application. The ICC could in fact adopt a set of guidelines so that professionals (including judges, counsel, VWU staff, and investigators) protect children interacting with the ICC and thus avoid their re-victimisation pursuant to Article 68(1) of the Rome Statute. The UN Model Law (which is based on the UN Guidelines) could be a good basis (where applicable to the ICC) to create a child-friendly legal framework for international criminal proceedings.[283] However, these guidelines should be adapted to the reality and legal framework of the ICC, and would eventually have to be tailored to the particularities of a given case before the ICC.

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recognises the role of the community as of the primary forum for preventing and responding to crime and social disorder. See: UN Office on Drugs and Crime, *Justice in Matters involving Child Victims and Witnesses of Crime: Model Law and Related Commentary* (April 2009), commentary to Article 30.

281 The appeal on Trial Chamber I's decision on reparations is still pending one year after it was rendered.

282 UNGA, *Impact of Armed Conflict on Children: Note by the Secretary-General* (26 August 1996) A/51/306, para. 205. See also Paris Principles, principles 7.31 and 7.32

283 UN Office on Drugs and Crime, *Justice in Matters involving Child Victims and Witnesses of Crime: Model Law and Related Commentary* (April 2009). The author proposes a set of guidelines based on the Model Law in the last chapter of this research.

Training is also essential, particularly because staff members involved with child victims and witnesses may not have the adequate specialisation in children and their rights to fulfil the ICC's mandate pursuant to Rule 86 of the RPE. Thus, training in relevant international instruments and standards, in the dynamics and nature of violence against children, in investigation of crimes involving children, and in adult-child communication skills, among many other areas, should be given to investigators, lawyers, judges, and any staff member or ICC official dealing with child victims and witnesses.[284]

Children's interaction with the ICC should never become detrimental to their psychological and physical well-being or cause re-victimisation. If a child testifies as a witness, participates as a victim or receives reparations, and pursuant to Article 21(3) of the Statute, the ICC must always put the child's best interests as a priority, regardless of any prosecutorial strategy or overall mission of the ICC. Children should never be expected to adapt to judicial proceedings. The ICC must adapt its proceedings, interpreting and applying the law pursuant to internationally recognised children's rights. Although the case law and practice analysed in this research has shown that a children rights perspective sometimes can be found in ICC proceedings, this needs to be further developed in order to fully and comprehensively include children's rights as described in the CRC within the ICC proceedings in which children participate as victims, testify as witnesses or benefit from reparations. As noted throughout this research, this is compulsory pursuant to Articles 21(3) and 68(1) of the Rome Statute, and Rule 86 of the RPE. The following chapter offers a number of recommendations in order to further adapt ICC proceedings to children's rights standards as well as a model of guidelines to be adopted by the ICC.

284 The UN Model Law proposes a multidisciplinary training intended for all professionals combined with a more specific training for each profession. See: UN Office on Drugs and Crime, *Justice in Matters involving Child Victims and Witnesses of Crime: Model Law and Related Commentary* (April 2009), 39. Also the Guidelines of the Committee of Ministers of the Council of Europe on child friendly justice recommended a multi-disciplinary approach, in which professionals working with child witnesses and victims (including lawyers, psychologists, judges, investigators, etc.) work together to understand the child and assess his or her legal, psychological, social, emotional, physical and cognitive situation. See: Council of Europe: Committee of Ministers, *Guidelines of the Committee of Ministers of the Council of Europe on Child-Friendly Justice* (17 November 2010).

6 Conclusions and recommendations

6.1 INTRODUCTION

The Rome Statute is undoubtedly a landmark legal instrument as regards the participation of victims in international criminal proceedings and their right to receive reparations.[1] The Rome Statute is also pioneering in respect of gender-perspective and children's rights.[2] Provisions such as Article 68(3) of the Rome Statute, which opens the possibility for victims to participate in proceedings, and Rule 86 of the RPE, which contains a general principle stating that the ICC shall take into account the needs, among others, of child victims and witnesses,[3] were unprecedented before the adoption of the Rome Statute in 1998. In that regard, the Rome Statute and in general the entire ICC legal framework is more inclusive than any other international tribunal. Thus, the ICC legal framework is comprehensive and consistent with the CRC and internationally recognised children's rights.

The main challenge for the ICC is to interpret and apply this comprehensive legal framework in its various country situations and in circumstances of

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1 Article 68(3) of the Rome Statute enshrines the right to participation and Article 75 of the Rome Statute provides for victims' reparations.

2 Articles 6(b) and (e), 7(g), and 8(2)(b)(ix)(xxii)(xxvi) and 2(e)(iv)(vi)(vii) include crimes particularly affecting children. Article 21(3) includes the principle of non-discrimination and the compulsory application of internationally recognised human rights. Articles 36(8)(b), 42(9), 43(6) and 44(2) provide that ICC judges, the Office of the Prosecutor, Registry and staff in general must have specialists in violence against women and children, among other issues. Articles 54(1)(b) and 68(1) and (2) provide that the personal circumstances of victims and witnesses, including age and gender, among other factors, should be considered during the investigation and protective measures shall be taken in order to protect these victims and witnesses. Rules 16-19 of the RPE provide for the functions of the Registry and particularly the VWU, vis-à-vis victims and witnesses, particularly the needs of children and other vulnerable individuals. Rule 86 of the RPE contains the general principle that in making any direction or order, the Court shall take into consideration the needs of victims and witnesses, among them children and victims of sexual or gender violence and persons with disabilities. Rule 87 of the RPE enumerates protective measures available to protect victims and witnesses and Rule 88 refers to special measures for victims and witnesses, including children. Rule 112(4) of the RPE also foresees the application of measures to avoid traumatisation of witnesses, including children, persons with disabilities and victims of sexual or gender violence. Rules 63(4) and 70-72 of the RPE contain the principles of evidence in cases of sexual violence.

3 UN Guidelines, para. 9(a) defines "child victims and witnesses".

armed conflict and massive human rights violations, as is the case of most (if not all) crimes within the jurisdiction of the ICC. This application and interpretation may result in discrimination of children (*de facto*) in spite of the ICC's legal framework, which although perhaps legally faultless, may be applied or implemented in the field and vis-à-vis child victims and witnesses in a controversial or undesirable manner (*i.e.* the *Lubanga case* and the Trial Chamber's conclusions regarding the use of intermediaries and child witnesses referred to above).[4]

The following conclusions and recommendations are a modest proposal that in the view of the author may improve the interaction of the ICC with child victims and witnesses so that their involvement is empowering but at the same time protective of their best interests, overall well-being and security, in accordance with the aforesaid ICC legal framework but also with internationally recognised children's rights. The following recommendations are based on existing international children's rights instruments, namely the CRC, but also other international instruments analysed in Chapter 3 of this research as well as the UN Guidelines referred to in Chapter 5.

It is imperative to understand that the Rome Statute was adopted in 1998 and therefore was in accordance with internationally recognised human rights at the time of its adoption. However, law, as any other social science, is in constant change and development, and children's rights and what we identify as "internationally recognised human rights" is progressively changing and developing. These final conclusions and recommendations endeavour to interpret the Rome Statute and the RPE with internationally recognised children's rights law adopted to date. Moreover, where applicable and in accordance with the Rome Statute, this Chapter will use as guidance soft law instruments in children's rights that have been adopted in recent years and that could enhance and progress the ICC's practice vis-à-vis child victims and witnesses.

6.2 CREATING A CULTURE OF CHILDREN'S RIGHTS IN INTERNATIONAL JUSTICE

In order to take into consideration the needs of children, the ICC should create a culture of children's rights throughout the entirety of its judicial proceedings, from the initial stages of an investigation to the final phase of reparations orders and their implementation.[5] After all, Rule 86 of the RPE obliges the ICC

4 Article 21(3) of the Rome Statute and Article 2 of the CRC. See also UN Guidelines, paras 8(b), 15-18; Paris Principles, principle 3.2.

5 UN Guidelines, para. 9(c) defines the "justice process" as encompassing the detection of the crime, making of the complaint, investigation, prosecution and trial and post-trial procedures, regardless of whether the case is handled in a national, international or regional criminal justice system for adults or juveniles, or in a customary or informal system of justice. See also UN Guidelines, para. 29.

to take the needs of children into consideration in any action or decision. It is thus fundamental to mainstream a child-sensitive perspective throughout ICC proceedings (analysed in Chapter 5 above), involving all actors engaged with the ICC, including judges, prosecutors, counsel, staff and also intermediaries and others working in the field.[6] However, a court-wide strategy that incorporates children's rights is not an ICC-only endeavour. The ICC exists and works in close relationship with the ASP, as well as with local and international NGOs, inter-governmental organisations and grass-roots groups. All these actors, along with the ICC, are required to create an international judicial system that is inclusive and safe for child victims and witnesses and properly addresses their needs.[7]

Moreover, as the international community and national and local authorities could look at the ICC practice as a "good example" and an institution that represents the "highest standards" of human rights, the ICC should adhere to its obligation pursuant to Article 21(3), and thus apply and interpret the law pursuant to internationally recognised human rights. Consequently, ICC standards should as a minimum act pursuant to internationally recognised children's rights.

Recommendation 1: The ICC should sign agreements of cooperation and support with UN specialised agencies (i.e. UNICEF and UN Women) as well as with international and national inter-governmental and non-governmental organisations specialised in children's rights.

The ICC does not operate alone and should benefit from the expertise and knowledge acquired by other actors after decades of experience with children's rights or in the field. An institutional agreement with children's rights organisations and programmes, beyond informal case-by-case cooperation, could guarantee a long-lasting relationship between the ICC and such institutions. These organisations could give their expert advice to the ICC on children's rights issues and could even provide the ICC with much needed resources (including human resources specialised in certain areas of children's rights). Local NGOs or other organisations could also assist the ICC in its activities (*i.e.* by implementing an ICC strategy on child-friendly outreach). The UN Special Representative for Children and Armed Conflict or even the CRC Committee could in due course monitor the work of these local and international actors or cooperate with international and national tribunals and other justice mechanisms, which should complement the ICC's mandate. Either one

6 UN Guidelines, para. 9(d) defines "child-sensitive" as an approach that balances the child's right to protection and that takes into account the child's individual needs and views.

7 Paris Principles, principle 3.26.

of these two monitoring entities could eventually adopt general recommendations in this regard.[8]

6.3 Recognising that children's rights are not optional

Pursuant to the principle of non-discrimination enshrined in Article 21(3) of the Rome Statute, any interpretation or application of the law which has the effect or purpose of impairing or nullifying recognition, enjoyment or exercise of any human right of children is prohibited. In order to avoid discrimination against child victims and witness participating in the ICC's judicial process, a children's rights perspective is necessary and consequently, the application of the CRC is not discretionary or optional. To the contrary, it is compulsory pursuant to Article 21(3) of the Rome Statute, which provides that the application and interpretation of the law must be performed in accordance with internationally recognised human rights and abiding to the principle of non-discrimination. As a result, the fundamental principles of the CRC should be guiding principles of the ICC when dealing with child victims and witnesses of international crimes.[9]

Recommendation 2: Although the ICC is not a "State Party" to the CRC it should apply these human rights standards, where relevant, in order to fulfil its mandate pursuant to Article 21(3) of the Rome Statute and in light of Rule 86 of the RPE.

Whenever the applicable law of the ICC is interpreted and applied, a children's rights approach should take the innate bias and adult-centred nature of most legal instruments, including the Rome Statute, the RPE and other ICC provisions, into consideration.

For every legal provision, it is necessary to ask: how does this provision particularly affect children? How could this provision result in the non-discrimination/inclusion of children or certain groups of children (*i.e.* girls)?[10] This simple exercise enables the practitioner (be it a judge, prosecutor or lawyer) to disregard the discriminatory application or interpretation of a law that, although formally non-discriminatory, could result in unfairness and exclusion when applied under certain circumstances (*i.e.* on-going armed conflict) and regarding certain groups (*i.e.* children).[11]

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8 See for example: UN Office of the Special Representative of the Secretary-General for Children Affected by Armed Conflict, *Children and Justice During and in the Aftermath of Armed Conflict* (September 2011).

9 Particularly Article 2, 3, 6 and 12 of the CRC. See also the UN Guidelines, para. 8(d).

10 UN Guidelines, para 8(b).

11 Article 21(3) of the Rome Statute and Article 2 of the CRC. UN Guidelines, paras 15-17.

A children's rights perspective is not an exclusive topic of cases dealing with crimes in which children are a material element of the crime (*i.e.* child recruitment). Most crimes (if not all) within the jurisdiction of the ICC will ultimately have children as their victims. It is practically impossible to think of a crime before the ICC that would not have any children as its victims, either directly or indirectly. Consequently, a children rights perspective needs to be incorporated in all ICC proceedings regardless of the nature of the crime being investigated or prosecuted. For example, charges brought against accused persons should undertake to include within the "facts and circumstances" the crimes committed against children in a given situation. Moreover, when reparations are granted to victims, children should be included among the beneficiaries. Thus, from the initial steps of the OTP's investigation to the final stages of reparations proceedings, a child's rights perspective could guarantee the fight for impunity for crimes committed against children pursuant to the Preamble of the Rome Statute.

Recommendation 3: Pursuant to Article 3 of the CRC, the best interests of the child should be taken into consideration in all actions concerning child witnesses or victims or any other child that could be affected by the work of the ICC.[12]

Although a standard procedure could be adopted by the ICC when dealing with child victims and witnesses, the best interests of a child concerned should be customised on a case-by-case basis, taking into consideration, *inter alia*, the child's views, his or her cultural and socio-economic situation, and any rights he or she may have pursuant to the Rome Statute and the CRC. Moreover, the concept and application of best interests of the child in a given case should not be unilaterally decided by the ICC, but should be decided upon in consultation with the child.

6.4 Adapting ICC proceedings to Article 12 of the CRC

Throughout this research, ICC provisions, its case law and practice have been analysed from a children's rights perspective, taking into consideration the CRC as point of departure. As a result, several recommendations are hereinafter offered as a means to make ICC proceedings more child-friendly; that is a judicial system inclusive of children's rights and one that guarantees participation of children in a safe, respectful and empowering manner and that takes serious consideration of their views in accordance with their age and maturity.[13]

12 UN Guidelines, para. 8(c). See also Paris Principles, principle 3.4. as regards the "best interests" of former child soldiers.

13 Article 12 of the CRC and UN Guidelines, paras. 8(d) and 21.

Recommendation 4: Pursuant to Article 12 of the CRC, the ICC should seek the views of child witnesses and victims, in accordance with their age and maturity and should duly inform the child about the judicial process.

A child's ability to participate as a victim or testify as a witness should be presumed and the burden of proof should not be imposed on the child to demonstrate his or her capacity. Judges and counsel in ICC proceedings should treat the child witness or victim with respect and dignity, protecting his/her well-being, but also avoiding paternalistic or patronising conducts that may demean the child's capacity, based on his/her age and maturity.[14]

An on-going process of information-sharing and mutual dialogue between the child concerned and the ICC is necessary to guarantee that the active participation of children in ICC proceedings meets their needs (particularly their safety, well-being and privacy) pursuant to Rule 86 of the RPE. Children that participate as victims or witnesses before the ICC must be duly prepared and be fully informed, in such a way and in a language they understand, about their rights and obligations, procedures before the ICC, as well as any consequences or effects that their interaction with the ICC may have upon their situation and that of their family.[15] The right to information must be guaranteed at the outset of the child's interaction with the ICC, for example when a child is first approached by an ICC investigator or offered to fill-in a victim's application form. If applicable, the child, and his or her parents or caregivers, must be duly informed about any unfounded expectations or misconceptions about the ICC or the outcome of ICC proceedings.[16]

Children who interact with the ICC should receive feedback about the outcome of ICC proceedings or any decision affecting them.[17] A child who has been approached by ICC investigators must be given proper information and feedback about any decision affecting them (for example a prosecutorial decision confirming a child as a trial witness or a decision withdrawing a child from the trial witnesses list). The same need for feedback is required when ICC staff or intermediaries approach a child to fill-in a victim's application form. The child is entitled to receive proper feedback regarding his or her application and any judicial or administrative decision affecting them (*i.e.* appointment of a common legal representative).

Recommendation 5: Child victims and witnesses should receive adequate support from specialised staff, trained in children's rights, children with trauma and violence against children, including sexual violence.

14 Article 68(1) of the Rome Statute and UN Guidelines, para. 8(a) and Part V.
15 Article 13 of the CRC.
16 Article 5 of the CRC.
17 UN Guidelines, para. 30(b).

Children's participation before the ICC should not a re-traumatising event,[18] and the ICC should support child victims and witnesses throughout ICC proceedings.[19] When the ICC first approaches a child, whether directly or through an intermediary, children should be supported so that they are not re-traumatised or taken advantage of by adults with other interests (*i.e.* be it an investigator trying to produce evidence or an intermediary trying to benefit from the child).[20] From the outset, a neutral support person from the VWU should at all times supervise and monitor interaction of the ICC with children, so that their rights and well-being are safeguarded and become a priority of the ICC's activity, pursuant to Article 68(1) of the Rome Statute and Rule 86 of the RPE.[21]

The ICC must put in place an accountability mechanism so that children interacting with the ICC, either directly or through intermediaries, can complain or obtain remedies when their rights are disregarded or violated in ICC proceedings.[22] Investigations pursuant to Article 70 of the Rome Statute should be carried out whenever there is information that crimes against the administration could have been committed in which child victims or witnesses were involved.

6.5 Preserving the evidence of child witnesses

The results in the *Lubanga* trial, in which child witnesses were found unreliable and in the end lost their victims status, prove that urgent measures must be taken to preserve the evidence of child witnesses in ICC proceedings. If these child witnesses would have been properly screened in the initial stages of the investigations, perhaps some of them would have been found unreliable early on in the investigation, and not at the end of a trial, and more than 5 years after their initial interviews with investigators.[23]

Alternative mechanisms other than live testimony in court should also be explored by the ICC in order to preserve the child's testimony from the passing of time. Pursuant to Article 56 of the Rome Statute or Rule 68 of the RPE, taking adequate safeguards to secure the rights of the defence, statements of child witnesses could be taken soon after the commission of the crimes, to be presented later in trial. Otherwise, the evidence of child witnesses (even the most reliable and trustworthy) may not endure the prolonged judicial proceedings

18 UN Guidelines, para. 42; Paris Principles, principles 3.18 – 3.19 and 7.75.
19 UN Guidelines, paras 22-25 and 30; Paris Principles, principle 8.
20 Article 68(1) of the Rome Statute and Rules 86-88 of the RPE. See also Article 19 of the CRC.
21 Rule 17 of the RPE; UN Guidelines, para. 24.
22 Paris Principles, principle 3.17.
23 Paris Principles, principle 7.28 provides useful guidelines in relation to interviews of former child soldiers.

before the ICC.[24] If one considers the developmental changes (both physical and mental) that a child undergoes while ICC proceedings are on-going, it would in reality be astonishing to "preserve" the evidence of these child witnesses unless measures are taken to actually safeguard their testimonies and encapsulate them from the passing of time, the loss of memory and changes in the mind of a child or an adolescent, who very often will move on to adult life while ICC proceedings are pending. However, as noted above, such measures should not be prejudicial to the rights of the defence to challenge evidence brought against the suspect or accused person.

Recommendation 6: Safeguards must be adopted to preserve the evidence given by children, protecting it from the passing of time, growth and development, as well as from intermediaries or third persons (including parents) with different interests, all of which could eventually affect its reliability.

As noted above, evidence of children can be preserved by taking written statements *in lieu* of in-court testimony or by adopting in-court measures to facilitate an honest and uninhibited testimony.

Child victims or witnesses appearing before the ICC may not necessarily understand the difference between right and wrong, telling the truth or lying. They may also not understand the meaning of crimes against the administration of justice, such as giving false testimony. Child witnesses appearing before the ICC must fully comprehend, in a language and manner they understand, the rights but also the responsibilities of witnesses testifying before the ICC, including the importance of telling the truth, the significance of the oath and the crime of false testimony.

However, even if children do understand the meaning of truth, they may also have fears or trauma (*i.e.* fears of further stigmatisation or retaliation) that may make it difficult, or prevent them from being sincere and truthful when the ICC approaches them. A child victim that is first approached by a stranger and is asked to fill-in an application form may understandably lie about his exact identity or his family, particularly since that child may have personally already experienced a crime in which another adult(s) caused him or her harm. Why would that child trust any adult (even if this is an ICC staff member)? Although child victims and witnesses should not be "coached" in preparation of their statement or testimony before the ICC or in filling-in a victim's application form, they should adequately be informed and screened to ensure that the information they give to the ICC is trustworthy and eventually reliable for criminal proceedings.[25] An investigator or ICC staff member collecting application forms or interviewing a potential witness should first and foremost gain the trust of the child. Only then can it be expected that the child concerned

24 UN Guidelines, para. 18.
25 UN Guidelines, para. 18.

will give a sincere and trustworthy testimony or account. Early actions from the prosecution could avoid multiple subsequent contacts and interrogations of the child witness that could eventually result in conflicting and contradictory statements that ultimately undermine the child witness' credibility.[26] The prosecution should thus take measures and judges should be keen to authorise these measures in order to preserve the evidence of child witnesses, while at the same time safeguarding the rights of the defence (*i.e.* admission of a prior written statement instead of oral testimony, in-court measures to facilitate testimony of child witnesses, expeditiousness of proceedings when related to child witnesses).[27]

Recommendation 7: The ICC should adopt measures by which children can participate in court proceedings in a safe and appropriate manner and in accordance with the rights of the accused and the expeditiousness of proceedings.

Participation of children as a prosecution witness, although a possibility, is not the only way in which children could interact with the ICC and may sometimes be detrimental, as proven by the *Lubanga case*, in which children's interaction proved to be prejudicial for the child and ultimately for the entire case.[28] Thus, other alternatives could be foreseen in which children are not witnesses under oath, but still communicate their views and concerns to the judges pursuant to Article 68(1) of the Rome Statute. For example, the Chamber could hold *in situ* visits to the places where the child victims or witnesses reside, in order to know the context in which crimes occurred or where the children concerned are living. The Chamber or an official from the Chamber could also take testimonies from child witnesses in their own country, albeit with safeguards to guarantee the rights of the defence. Child victims could also address the judges by way of unsworn statements, simply to express their views and concerns, and without having to be subject to cross-examination.[29]

Recommendation 8: The ICC should take measures to ensure that child witnesses give testimony in a safe and appropriate manner.

There will be instances when the *viva voce* testimony of a child witness is necessary. In such instances, the competent Chamber could decide to appoint an expert on judicial proceedings dealing with children, which would enable

26 UN Guidelines, paras 12-14.
27 UN Guidelines, paras 30-31.
28 As noted above, the Trial Chamber in the Lubanga case found that all but one former child soldier witness were unreliable.
29 Article 68(3) of the Rome Statute and Article 12 of the CRC. See also UN Guidelines, paras. 8(d) and 21.

the Chamber to take informed judicial decisions to guarantee the child witnesses' safety and well-being pursuant to Article 68(1) of the Rome Statute.[30]

Prior to any intervention in which the testimony of a child will be taken, he or she should be properly informed, in a way and language that he or she understands, about the proceedings that will take place. Children should also be adequately informed about the importance of telling the truth and the significance of the oath, if this is taken. Moreover, whenever children are examined as witnesses in ICC proceedings, they should be approached in a child-friendly, amenable environment that must be adapted to children's needs. Whether in a courtroom or in any room via video link or via a recorded or written statement, measures must be taken so that the location where the child testifies is hospitable (clothing of lawyers and judges, sight screens in case of presence of the accused, etc.).

Court sessions in which children appear should avoid any disruptions or distractions, unless these are due to the needs of the child (*i.e.* requested break or assistance). Thus, procedures such as the Rule 98 deposition exercise made in the *Lubanga case*, could be used to take the testimony of child witnesses without interruptions due to objections from the parties. Examination or cross-examination (if necessary) should be done in a conversation-like manner that favours open communication between the child witness and those listening to his or her testimony. Multiple interviews or examination of a child witness should be avoided and efforts must be made so that evidence from child witnesses is uninterrupted and is collected promptly, avoiding long periods of time between interviews or examinations or changes in the person(s) conducting such interviews or examinations.[31]

In principle, cross-examination of child witnesses by trial lawyers should be avoided and child witnesses should give testimony by way of a written statement or a previously recorded statement. In cases where there are manifest contradictions, the Court could examine the child witness. However, it would be more appropriate for judges, and not counsel, to pose any questions to the child witness. This would also avoid multiple interruptions of testimony due to parties' objections. As noted above, this examination could take place *in situ*, in an environment that is close and familiar to the child witness, or via video-link. At all times child witnesses should be able to give their testimony in their own words and not in the strenuous manner in which cross-examination is often pursued by counsel.

30 UN Guidelines, para. 14.
31 UN Guidelines, paras 30-31.

Recommendation 9: Adequate support should be offered to children who participate in person in ICC proceedings either as victims or witnesses.

The judicial proceedings in which child witnesses testify or participate in person, should preferably be confidential in nature. Whenever it is possible and not contrary to the rights of the accused person, children participating as victims before the ICC should remain anonymous. If disclosure of the child's identity to the accused is necessary, measures should be taken to avoid eye contact or direct confrontation between the accused person and the child.

Whenever a child victim or witness participates or testifies before the ICC, support staff, such as psychologists, should be available to offer support to the child throughout his or her interaction with the ICC. The witness preparation and familiarisation process should include an informal meeting between the child witness, and counsel, but could also include judges, in order to build confidence and create a friendly environment of trust between the child witness and those who will hear his or her testimony.[32]

6.6 PROTECTING CHILDREN AGAINST EXPLOITATION

Many child victims and witnesses of crimes within the jurisdiction of the ICC will be refugees, displaced, separated, unaccompanied or orphaned.[33] This situation makes them extremely vulnerable to exploitation and manipulation, including crimes against the administration of justice.[34]

Recommendation 10: The ICC must take measures to protect child victims and witnesses from exploitation by third persons that may want to take advantage of ICC proceedings for their own benefit.

The use of intermediaries by the ICC, necessary and essential in many circumstances, should nevertheless be closely monitored and controlled by ICC prosecutors, the Registry and ultimately the judiciary. The ICC should only collaborate with reliable and trustworthy intermediaries who are knowledgeable and have experience in children's rights. Although this statement appears self-evident, the *Lubanga* case proved that the ICC relied on untrustworthy intermediaries.

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32 Rule 17 of the RPE; UN Guidelines, paras 22-25.

33 Paris Principles, principle 5.

34 Article 68(1) of the Rome Statute and Rules 86-88 of the RPE. See also Articles 19, 32 and 36 of the CRC. For crimes against the administration of justice, see Article 70 of the Rome Statute. See also Principles 10 and 12(b) of UNGA, *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law: resolution adopted by the General Assembly* ("UN Basic Principles") (21 March 2006) A/RES/60/147.

In instances when such specialised intermediaries are unavailable or inexistent, intermediaries (either individuals or organisations) working with the ICC in the field should be properly trained and informed on children's rights and the best practices to deal with child victims and witnesses.[35] At all times, the ICC should ensure that children interacting with the ICC are doing so voluntarily and free of any coercion and that they have been properly informed of their right to participate with the ICC (not their obligation) as well as any implications of their participation. The ICC should make sure that whenever this interaction with the ICC affects the child's well-being or the child is no longer interested, the ICC should respectfully withdraw the child from any dealings with the Court in a manner that is appropriate and non-traumatic and does not affect the privacy, interests and safety of the child and his or her family.[36]

Although it is true that the ultimate goal of the ICC is to bring perpetrators of crimes to justice, it is also essential that the ICC does not cause harm to the victims it is intended to redress and protect, particularly if these are children. Therefore, close presence of specialised ICC staff in the field, working along with intermediaries but also supervising and monitoring the work they do in the field, is essential to guarantee active children's participation but also their well-being and safety pursuant to Article 68(1) of the Rome Statute.[37]

6.7 Including the plight of children in all ICC cases

All crimes within the jurisdiction of the Court, even if exclusively committed against adults, will directly or indirectly have children as victims. Violence against children is a weapon of war in many current armed conflicts. Likewise, children are often target of systematic or generalised attacks against civilians and genocide campaigns. In most cases brought before the ICC children will be among the civilian victims of genocide, crimes against humanity and war crimes. Consequently, this dire reality should be reflected in the prosecutorial strategy of the ICC.[38]

Recommendation 11: The Prosecutor should endeavour, whenever there is evidence, to include in ICC investigations and trials charges for crimes committed exclusively against children and crimes committed against children in wider, more general attacks against civilians.

35 UN Guidelines, para. 42.
36 Rule 87 of the RPE; UN Guidelines, paras 26-28 and 32-34.
37 Article 68(1) of the Rome Statute and Articles 6 and 16 of the CRC. See also principle 12(b) of the UN Basic Principles.
38 Preamble of the Rome Statute, Article 19(2) of the CRC and principles 3(b) and 4 of the UN Basic Principles.

The Prosecutor should avoid having adult-centred charges that solely reflect the crimes committed against adults and harms suffered by the adult civilian population in a given case. The Prosecutor should endeavour, when there is sufficient evidence, to include a children's dimension in the charges brought by the Prosecutor against individuals, particularly in the "facts and circumstances" of a given case. Thus, the "facts and circumstances" of the charges, necessary to confirm the charges against a suspect and eventually to convict him/her in trial, should undertake to include crimes committed against children, bearing in mind gender particularities.[39]

Accordingly, the Prosecutor of the ICC should make an effort to include in any investigation: a) crimes committed against children in which children are an element of the crime; and b) crimes committed against children in which children suffer disproportionate effects or are disproportionately victimised vis-à-vis other sectors of the population.

Recommendation 12: The Pre-Trial Chamber should oversee the Prosecutor's investigation in order to guarantee that the charges brought against individuals are comprehensive and inclusive.

The Pre-Trial Chamber has an important role to play as regards the manner and content of the charges the Prosecutor brings against an individual in a particular situation or case. For example, when the prosecution requests authorisation to initiate an investigation under Article 15 of the Rome Statute, the Pre-Trial Chamber could request that information regarding crimes committed against children and the effects that other crimes have on children be considered in the investigation to be authorised. The Pre-Trial Chamber could also instruct that the views of children are included in Article 15 representations made by victims.[40] Victims' organisations working with children's rights could also play an important role in providing the Pre-Trial Chamber with Article 15 representations, which incorporate the perspective of children. This judicial control is important so that crimes committed against children and the effects that international crimes have on children are adequately charged in pre-trial proceedings and ultimately prosecuted in trial proceedings and included in reparations orders.

6.8 REACHING OUT FOR CHILDREN

Recommendation 13: The ICC should organise outreach activities that target children in a given situation.

39 Articles 23 and 30 of the CRC; UN Guidelines, paras 10-11.

40 Article 15 of the Rome Statute and Article 12 of the CRC. See also the UN Guidelines, paras 8(d) and 21.

As already observed above, children should be informed, in a language and manner they understand, about their rights to participate and receive reparations before the ICC, but also about the risks and difficulties they may encounter as a result of their interaction with the ICC. Child victims and witnesses need to be informed about the possibilities but also limitations of ICC proceedings so that they do not have unreal expectations that would lead to frustration or even re-victimisation.[41]

Child victims and witnesses have the right to receive, throughout the entire proceedings, adequate feedback about judicial decisions that are relevant to them. The word "throughout" should encompass the initial stages of the investigation through to the final stages of reparations. Outreach is thus essential to communicate with children concerned who may not necessarily be reachable through ordinary means of judicial notification.

Outreach tools must be adapted to the education level, maturity and age of the child population. Children should not be expected to understand legal or adult-centred concepts. Outreach activities that target children need to take into account the means of communication and access to information that children have in a given situation (*i.e.* schools, parents, radio, and internet).

Finally, though the ICC should rely on the expertise and know-how of children's rights agencies and organisations working in the field, it should not delegate all its outreach activities to third parties. It is essential for the ICC to have its own in-house specialists able to tailor outreach programmes to children in the different situations under the ICC's scrutiny.

6.9 Guaranteeing active participation of child victims

In its first ten years, ICC case law is far from homogenous and sometimes Chambers have adopted different criteria that may send contradicting messages to victims and persons assisting them in their participation process.

Recommendation 14: The ICC case law should become consistent as regards children's participation as victims in the proceedings in accordance with the CRC and other applicable international instruments.

In relation to child victims, ICC case law should determine once and for all whether child victims need parental consent to apply for participation. Additionally, Chambers should adopt uniform criteria in relation to the concept of legal guardian of children acting on their behalf and the need to prove the kinship between the child victim and the person acting on his or her behalf.

41 Articles 13 and 17 of the CRC. See also principles 11(c), 12(a) and 24 of the UN Basic Principles; UN Guidelines, paras 19-20.

Chambers should also adopt a uniform policy as regards the need for victims to submit individual application forms in order to participate in proceedings via a common legal representative. Whatever criteria is ultimately adopted (individual application forms or collective means of participation), the ICC should take into consideration that in ICC proceedings not only the accused person has the right to be tried without undue delay, but also victims, and particularly child victims, have the right to fair judicial proceedings.[42]

Considering the rapid developmental changes in children and adolescents, application processes, trials and reparations mechanisms that extend too long in time may become inadequate or even moot. Victims' application processes should be expedited and become more effective so that an increased number of victims does not equate into overburdened parties and ICC organs, and ultimately ineffective participation of individual victims. Victims' participation however, should not be questioned, as it is an intrinsic part of the ICC's judicial system, enshrined in Article 68(3) of the Rome Statute. Victims' participations should be adapted in order to facilitate participation that is meaningful and at the same time conscious of the ICC's limited financial resources and the workload of defence teams. Particularly the use of individual application forms and consequently the case-by-case judicial analysis for each applicant should be revisited.

The recent case law in the Kenya Situation, in which individual applications are no longer necessary, may be a window of opportunity for victim's participation that is effective and not contrary to the rights of the accused and the expeditiousness of trial proceedings. However, if the approach of Trial Chamber V were to be followed, thus requiring application forms solely for victims wishing to participate in person in proceedings, a reform to the RPE and the RoC would be appropriate (particularly Rule 89 of the RPE and Regulation 86 of the RoC). The current case law, although unappealed, may go beyond what the drafters of the RPE and certainly the judges, who drafted the RoC, had foreseen as victims' participation at the ICC.

A collective approach of victims' participation, and ultimately reparations, is foreseeable in all future ICC proceedings, particularly due to the Court's limited resources and the difficult security situation faced by victims in the field. However, children must be included and not be discriminated within the wider "collective" approach. Their views and concerns should be given due consideration,[43] and, if necessary, measures of affirmative action should be taken to include children's views, and those of different groups of children (*i.e.* girls), within the analysis of any collective approach.[44]

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42 UN Guidelines, para. 30(c).

43 Article 21(3) of the Rome Statute and Article 2 of the CRC. See also Principles 12 and 25 of the UN Basic Principles and UN Guidelines, paras 8(b) and 15-17.

44 CEDAW, article 4.

Finally, if a collective approach is followed, common legal representatives should have demonstrated experience and capacity to deal with child victims-clients and they should be knowledgeable in children's rights. If they do not already have that expertise, counsel in the list of counsel of the ICC and any field staff assigned to the teams of legal representatives should be trained in children's rights issues.[45] The OPCV, which could be given a leading role in this new collective approach of victims' participation, should also have in-house experts in children's rights.

6.10 PROVIDING MEANINGFUL, ADEQUATE AND FAIR REPARATIONS FOR CHILD VICTIMS, THEIR FAMILIES AND COMMUNITIES

Recommendation 15: Reparations in general, and particularly collective reparations, should take into consideration the harms suffered by child victims as a result of crimes within the jurisdiction of the ICC.

The ICC should take into consideration the socio-economic impact that crimes within its jurisdiction have on children, their families and communities. Reparations for crimes committed against children must take into account the effects these crimes caused on their physical and psychological well-being, their education and family life.[46] Moreover, when crimes are committed against children, the harms suffered by family members, including parents and siblings, should be presumed. Likewise, when crimes are massively or systematically committed against children, the harms suffered by the community in general should also be taken into consideration.[47]

The ICC will most likely be a forum for collective rather than individual reparations, given the generalized nature of the crimes and the fact that most victims will not be individually identified nor will they have access to the ICC to submit an individual application form to receive reparations. When implementing collective reparations for a community or group of victims in general, the ICC should take into consideration the particular needs of child victims and any priorities they may have vis-à-vis the adult population. If collective reparations concern child victims in particular, the ICC should take into account the needs and views of the different groups of children within a community pursuant to Rule 86 of the RPE (*i.e.* different ethnic groups, boys and girls, children with disabilities or any other condition that makes them a priority group (*i.e.* children with HIV or child-moms)).[48]

45 UN Guidelines, paras 22 and 42.
46 Principle 15 of the UN Basic Principles.
47 Paris Principles, principle 7.30.
48 Article 21(3) Rome Statute, Rule 86 of the RPE and Articles 2 and 12 of the CRC. See also article 23 of the CRC in relation to children with disabilities.

6.11 Involving States in an ICC Children's Rights Strategy

Recommendation 16: The ASP should elect individuals with expertise in children's rights and allocate funds in order to guarantee child victims and witnesses' rights.

The ASP should elect to key positions such as judges, the Prosecutor, deputy prosecutors, and the Board of Directors of the TFV, persons with expertise in children's rights, particularly violence against children. Likewise, the ASP should monitor ICC organs' recruitment policies so that persons with the above expertise are appointed as staff members. Moreover, the ASP, who approves the ICC's annual budget, should allocate funds to the organs of the ICC so they can fulfil their mandate to include children's rights and gender perspective in their work. Budget limitations or cuts should not unduly reduce the possibility of child victims to participate and receive reparations. Likewise, budget limitations must under no circumstances affect the ICC's duty to protect the well being of child victims and witnesses.

6.12 Concluding remarks

Child victims and witnesses in ICC proceedings have suffered immensely as they have directly or indirectly undergone the indescribable horrors of armed conflict and gross human rights violations. Judicial proceedings should redress these most vulnerable victims in a considerate manner, but also acknowledge the immense potential that children have in achieving peace and reconciliation, which should be one of the ultimate goals of international justice. This task is unquestionably difficult to achieve and sometimes the best-intended actions might result in undesirable results that ultimately cause harm to child victims, their families and communities. However, responsibilities should be assumed and after ten years of experience, the ICC should adopt a court-wide policy that protects child victims and witnesses pursuant to Article 68(1) of the Rome Statute, while at the same time enabling their active participation in judicial proceedings. This research is a modest contribution that hopefully will guide ICC staff and officials to achieve the aspiration to "bring justice to victims", and within them, girls and boys who, notwithstanding their young age, witnessed and survived the most serious crimes against humankind.

In the following pages a series of "guidelines" are proposed, which could be of use for all organs of the ICC to implement a children's rights perspective in ICC proceedings. However, these guidelines should be subject to the principle of legality and the rights of the accused person enshrined in the Rome Statute.

A similar comprehensive document could be adopted by an ICC judges' plenary or as an ASP resolution. Otherwise, the suggestions and proposals contained therein could be used as guidance when adopting ICC documents, such as the strategy on victims' participation or on intermediaries, in order to transversally include a children's rights perspective in the work of the ICC.

Guidelines on children and the International Criminal Court

These guidelines are a proposal based on the Guidelines and Model Law on Justice Matters involving Child Victims and Witnesses of Crime, which were adopted by the United Nations Economic and Social Council in order to assist, among others, international organisations in "designing legislation, policy, programmes and practices that address key issues related to child victims and witnesses of crime".[49] The proposed guidelines also take into consideration the applicable law under the Rome Statute, the Rules of Procedure and Evidence and other applicable instruments under Article 21(3) of the Rome Statute, which could be considered as "internationally recognised" children's rights.

PREAMBLE

Taking into consideration Article 21 of the Rome Statute ("Statute"), particularly paragraph 3, which states that the application and interpretation of law "must be consistent with internationally recognised human rights",

Taking into consideration the Convention on the Rights of the Child ("CRC"),

Taking into consideration the United Nations Guidelines on Justice in Matters involving Child Victims and Witnesses of Crimes ("UN Guidelines"),

Taking into consideration that only if the rights enshrined in the abovementioned instruments are guaranteed and safeguarded, will children participate in ICC judicial proceedings in a manner that is empowering for the children concerned, their families and their communities,

The following Guidelines on Children and the ICC ("Guidelines") are adopted.

49 UN Guidelines and Model Law on Justice Matters involving Child Victims and Witnesses of Crime, 2009.

Definitions

For the purpose of these Guidelines, the following definitions shall apply:

- *Child victim*: person under the age of 18 who is a victim of a crime within the jurisdiction of the Court pursuant to Rule 85 of the Rules of Procedure and Evidence, regardless of his or her role in the commission of the crime or in the prosecution of the alleged person(s) responsible. A child victim includes a person under the age of 18 at the time of the commission of the crime, regardless of his/her age at the time of the proceedings before the ICC.
- *Child witness*: person under the age of 18 who is a witness of a crime within the jurisdiction of the crime, regardless of his or her role in the commission of the crime or in the prosecution of the alleged person(s) responsible. A child witness includes a person under the age of 18 at the time of the commission of the crime, regardless of his/her age at the time of the proceedings before the ICC.
- *Dual status child*: person under the age of 18 who has the dual status of victim with participatory status and witness in pre-trial or trial proceedings.
- *ICC proceedings*: includes the early stages where the ICC's jurisdiction is triggered, including Article 15 proceedings, and encompasses the investigation, pre-trial and trial stages (including sentencing and reparations procedures), together with any appeals proceedings resulting thereof.
- *Child-sensitive*: means an approach that gives primary consideration to a child's right perspective, to the child's protection and that takes into account a child's individual needs and views.

Guidelines

1. *Best interests of the child*

Every child victim and witness has the right to have his or her best interests given primary consideration, while safeguarding the rights of the accused.

2. *Confidentiality*

All persons working with a child victim or witness shall maintain confidentiality of all information that they may have acquired in the performance of their duty.

3. *Training*

Judges, prosecutors and staff members of the ICC, as well as counsel and any intermediaries working in the field, should undergo appropriate training on issues related to child victims and witnesses.

4. *Right to be informed*

A child victim or witness, and, whenever possible, his/her parents or guardian, legal representative or other appropriate person designated to provide assistance to the child, shall, from their first contact with the Court, and throughout the entirety of his or her interaction with the Court, be promptly informed about the following:

a. Procedures of ICC proceedings, including the role of child victims or witnesses, the importance, timing and manner of testimony, and the ways in which interviews will be conducted during the investigation and trial;
b. Existing support mechanisms for a child victim or witnesses, including available protective and special measures provided for in Rules 87 and 88 of the Rules of Procedure and Evidence, including the possibility to have video-conference or *in situ* hearings, as well as the possibility to have a legal representative or any other person assigned to them to provide assistance;
c. Existing mechanisms for the review of decisions affecting the child victim or witness;
d. Relevant rights of child victims and witnesses pursuant to the Rome Statute and other applicable law;
e. Possibilities for child victims to obtain reparations pursuant to Article 75 of the Rome Statute;
f. The progress and disposition of the specific case, including any arrest, or relevant judicial decisions that impact the interests of the victim or witness or the outcome of the case.

The Court shall ensure that proceedings relevant to the testimony of a child victim or witness are conducted in a language that is simple and comprehensible to the child.

5. *Child victims*

a. Pursuant to Article 68(3) of the Rome Statute, the Court should consider the views and concerns of child victims in accordance with their age and maturity.
b. Whenever the Chamber requests that a common legal representative is chosen to represent a group of victims pursuant to Rule 90 of the Rules of Procedure and Evidence, the Registry shall take into consideration the distinct interests and needs of child victims. Child victims shall be presumed indigent for the purposes of legal aid.

6. *Investigation of cases involving child victims or witnesses*

a. The Office of the Prosecutor should have specially trained staff able to guide any interview of a child victim or witness so that it is carried out with a child-sensitive approach.

b. Repetition of interviews should be avoided to prevent re-victimisation of the child.
c. Medical examination of child victims or witnesses should only be carried out if deemed necessary by the Prosecutor or the competent Chamber.
d. If at any time during the investigation phase, any doubt exists as to the physical or mental health of the child, the ICC shall ensure that a comprehensive medical examination is carried out on the child as soon as possible so that the child receives proper treatment immediately.

7. *Support person*
a. Pursuant to Rule 17 of the Rules of Procedure and Evidence, from the beginning of the investigation phase and during the entirety of the child's interaction with the Court, child victims and witnesses shall be supported by a person with training and professional skills to communicate with and assist children of different ages and backgrounds in order to prevent the risk of duress or re-victimisation.
b. Continuity of the relationship between the child and the support person shall be ensured to the greatest extent possible throughout the justice process.
c. If the support person fails to carry out his or her duties and functions, the competent Chamber shall designate a replacement support person, after having taken into consideration the views of the child concerned.

8. *Reliability of child witnesses*
a. A child is deemed to be a capable witness and his or her testimony shall not be presumed invalid and untrustworthy by reason of his or her age alone.
b. A child witness may be allowed to give testimony assisted by an expert specialised in understanding and communicating with children.
c. The weight given to the testimony of a child witness shall be in accordance with his or her age and maturity.
d. A child witness shall not be compelled to swear under oath, for instance, if the child is unable to understand the consequences of taking oath. In such cases, the competent judge or Chamber may offer the child the opportunity to promise to tell the truth. This should not, in any case, affect the reliability or trustworthiness of the child's testimony.

9. *Competency examination*
A competency examination shall only be conducted if the relevant Chamber, at the request of a party or *proprio motu*, determines there are compelling reasons to do so.

10. *Child-friendly measures*

a. A child witness or victim shall have the opportunity to express his or her views and concerns on matters related to the case, his or her involvement in the proceedings, in particular his or her safety, his or her preference to testify or not and the manner in which the testimony is to be given, as well as any other relevant matter affecting him or her. In every case, the child should receive a clear explanation as to any decision taken in this regard.
b. Waiting rooms used by child victims and witnesses shall be equipped in a child-friendly manner and should be separate from those provided for adult witnesses and victims and the accused person.
c. Testimony of a child witness shall be given priority in order to minimise the waiting time during the court appearance.
d. The competent judge or Chamber shall allow the support person to accompany the child throughout his or her participation in court.
e. The competent judge or Chamber shall inform the support person and the child of the possibility to ask for a recess whenever the child needs one.

11. *Protective measures for child witnesses and victims*

Pursuant to Rule 87 of the Rules of Procedure and Evidence, the competent Chamber or judge may order protective measures, taking into account the views of the child concerned and his or her best interests.

12. *Reparations for child victims*

a. The Court shall inform a child victim, his or her parents or guardian and his or her legal representative about the reparations procedures.
b. When granting reparations, the Court shall take into consideration age and gender-specific harms suffered by child victims, as well as any particular condition of the child pursuant to Rule 86 of the Rules of Procedure and Evidence.
c. The views and concerns of children should be given due consideration in accordance with their age and maturity when designing and implementing reparations.

Summary

The International Criminal Court (ICC) is the world's first international permanent court with jurisdiction to judge individuals for crimes of genocide, crimes against humanity, war crimes and aggression, with innovative aspects, such as the participation of victims in judicial proceedings, as well as reparations to which victims of crimes within the ICC's jurisdiction are entitled. Thus, the Rome Statute goes beyond the purely retributive nature of judicial proceedings, and includes a restorative mandate, that encompasses the possibility for victims to express their views in international criminal trials as well as the possibility to receive reparations for the harms suffered. However, the advances made with the adoption of the Rome Statute need to be applied to concrete situations currently investigated by the ICC's Prosecutor and in particular cases against accused persons.

This thesis offers an analysis and recommendations for the ICC to fulfil its mandate, particularly vis-à-vis child victims and witnesses of crimes within the ICC's jurisdiction. It firstly analyses the Rome Statute and other applicable law of the ICC, which give the ICC not only a clear penal mandate, but also require that the ICC respects, as a minimum, the safety and well-being of victims and witnesses, particularly those who are most vulnerable, such as children.

However, during its first decade of existence the ICC has faced immense challenges when implementing these legal provisions in its initial cases. The first case before the ICC, the Prosecutor v. Thomas Lubanga Dyilo (*Lubanga case*), involves exclusively charges of enlistment, conscription and use of children under the age of 15 to participate actively in the hostilities. This case faced unimaginable difficulties, which could explain why it is still ongoing after more than seven years since Mr Lubanga's first appearance before the judges at The Hague. Within this complex first ICC case, children were at the centre of ICC proceedings, and thus its achievements and failures are a vivid example of the advances and drawbacks of the ICC's mandate vis-à-vis children. Unfortunately, the Lubanga case also demonstrates that the current ICC practice may not adequately protect the safety, physical and psychological well-being, dignity and privacy of children interacting with the ICC, either as witnesses or victims of crimes within the ICC's jurisdiction, pursuant to Article 68 of the Rome Statute. It also raises the issue of whether children should at all testify in international trials (particularly *viva voce* in The Hague) and whether the current victims' participation system is suitable for child victims who may

want to present their "views and concerns" to ICC judges pursuant to Article 68(3) of the Rome Statute.

However, not investigating crimes committed against children (particularly when the Prosecutor has received information or evidence that this has occurred) or excluding children from ICC proceedings (when this is not contrary to their best interests) is not a legitimate course of action, since the Rome Statute and other applicable law provide that children require special attention by the ICC. However, these legal provisions are general and thus other applicable law pursuant to Article 21 of the Rome Statute offer valuable guidance in order to give more specific substance to concepts such as the "needs of witnesses and victims" and their "safety, physical and psychological well-being, dignity and privacy", and for the purpose of this research, children, as provided for in Rule 86 of the RPE. Hence, this research offers a comprehensive study of the ICC's legal framework from a children's rights perspective, while at the same time balancing these rights with the rights of the accused and the right to a fair trial.

The main research question, which is the unifying thread of all six chapters of the research is:

> *How should ICC proceedings address the needs of children in accordance with Rule 86 of the RPE, in order to: a) protect the safety, physical and psychological well-being, dignity and privacy of child victims and witnesses pursuant to Article 68(1) of the Rome Statute; b) guarantee that the views and concerns of child victims are taken into consideration as provided for in Article 68(3) of the Rome Statute; and c) provide reparations to child victims pursuant to Article 75 of the Rome Statute?*

Chapter 1 gives a general introduction to the role of children in current armed conflicts, which sets the general context of the situation of children who will come to the ICC either as victims or witnesses of crimes within its jurisdiction. It first describes how violence against children has become a weapon of war in many current armed conflicts. It then analyses the impact that crimes against children have on their lives and those of their families and communities. However, it goes beyond the role of children as victims of armed conflict and analyses the complicated reality of many children that are also perpetrators of crimes within the context of an armed conflict, particularly the situation of child soldiers. Finally, this chapter focuses on the significant role that children could play as participants in the peace and reconciliation process, including their participation in international justice as well as non-judicial mechanisms. Chapter 1 thus illustrates that child victims and witnesses are not simply "vulnerable" individuals. Children appearing before the ICC include children who may be perpetrators of crimes (albeit not within the ICC's jurisdiction). Likewise, as a result of armed conflict, children appearing before the ICC could also be more empowered, mature and independent that children

in other situations. This analysis is important since these multifaceted aspects of children in armed conflict should be taken into consideration when dealing with children's interaction with the ICC in Chapters 5 and 6 of this research.

Chapter 2 is a brief introduction to the ICC, its establishment and its main organs. This introduction is made through a children's rights perspective, thus focusing on how the different organs of the ICC should work in order to fulfil the ICC's mandate pursuant to Rule 86 of the RPE. It is also an important Chapter to introduce the organisation and structure of the ICC, particularly since different organs and sections of the ICC are later mentioned and referred to in Chapters 5 and 6 of this research. Although this Chapter may be superfluous for readers with knowledge on the ICC, it could be of value for readers who, although knowledgeable in children's rights, may not be acquainted to the ICC's structure and functioning.

Chapter 3 focuses on the relevance of other international instruments for the interpretation and application of ICC provisions in proceedings related to child victims and witnesses. This Chapter takes as initial point Article 21 of the Rome Statute, and mainly paragraph 3, which requires ICC judges to interpret and apply the law in accordance with internationally recognised human rights. As regards children, the logical point of departure is the Convention on the Rights of the Child (CRC). The Chapter also refers to other sources of law that, although not applicable law *per se* pursuant to Article 21 of the Rome Statute, could serve as guidance for ICC judges when interpreting the law. Finally, this Chapter analyses international case law that may be relevant and applicable for child victims and witnesses before the ICC. In particular, the jurisprudence of the Special Court for Sierra Leone is analysed regarding crimes of enlistment, conscription and use of children to participate actively in the hostilities and crimes of sexual violence. Furthermore, the case law of the regional human right courts is studied. Of great significance is the case law of the Inter-American Court of Human Rights, particularly in relation to reparations. The analysis contained in Chapter 3 thus gives the legal basis for the use of other international instruments in the following chapters.

Chapter 4 focuses on the substantive law of the ICC. It describes very briefly the ICC's jurisdiction. The Chapter then thoroughly describes crimes committed exclusively against children but also crimes that, although committed against the general population, have disproportionate effects on child victims. This analysis is of significance, since children will interact with the ICC when they are victims or witnesses of crimes within its jurisdiction. Thus, the analysis of the elements of crimes is necessary to identify who are the child victims and witnesses at the ICC. For example, in order to establish whether a child is a victim within the jurisdiction of the ICC pursuant to Rule 85 of the RPE, an analysis of the elements of the relevant crimes is required. Likewise, in order to establish the harms suffered in reparations proceedings, an analysis of the crimes committed against children and the effects that these crimes have upon them is fundamental. This Chapter is also important to understand the

particular circumstances of child victims and witnesses addressing the ICC, who may need protective or special measures as a result of the crimes (*i.e.* a child witness with a post-traumatic stress disorder as a consequence of sexual violence). Thus, although this Chapter analyses the substantive law of the ICC, it ultimately has significant bearing on the procedural issues discussed in Chapters 5 and 6 of this research.

Chapter 5 is the *pièce de résistance* of this research, as it focuses on the three manners in which children can interact with the ICC: as participating victims, as witnesses and as beneficiaries of reparations. It analyses the existing legal framework and practice at the ICC, but also provides examples of how other applicable law related to children's rights could be of use in proceedings in which children interact with the ICC. This Chapter proposes different methods, standards and good practices that could be adopted in ICC proceedings in order to take into consideration the needs of child victims and witnesses pursuant to Rule 86 of the RPE.

Chapter 6 proposes a series of recommendations that could be adopted in order to guarantee the active participation and reparations of child victims in ICC proceedings in accordance with international standards in children's rights and also pursuant to Rule 86 of the RPE. The Chapter also proposes measures that could be taken when children appear as witnesses in proceedings before the ICC, in order to make their experience non-traumatic, but also in order to guarantee the rights of the accused and a fair trial. The final chapter also proposes a series of guidelines, which provide specific parameters in order to fulfil the mandate of the ICC as provided for in Article 68 of the Rome Statute and Rule 86 of the RPE and pursuant to international children's rights standards.

Samenvatting

KINDEREN EN HET INTERNATIONALE STRAFHOF
Analyse van het Statuut van Rome vanuit een kinderrechtenperspectief

Het Internationale Strafhof (ICC) is het eerste permanente internationale strafhof ter wereld met rechtsmacht om individuele personen te berechten voor genocide, misdaden tegen de menselijkheid, oorlogsmisdaden en agressie. Het kent innovatieve aspecten, zoals de participatie van slachtoffers in gerechtelijke procedures, evenals schadevergoedingen waar slachtoffers van misdaden binnen de jurisdictie van het ICC recht op hebben. Zodoende gaat het Statuut van Rome verder dan puur het berechten van misdrijven. Het maakt het voor slachtoffers mogelijk om hun verhaal te doen tijdens de zitting en schadevergoeding te ontvangen. Niettemin moeten de vorderingen die gemaakt zijn met de aanname van het Statuut en de oprichting van het Hof ook gerealiseerd worden in de situaties en strafzaken die worden onderzocht door de Aanklager van het ICC.

Dit proefschrift biedt een analyse en aanbevelingen aan het ICC om diens mandaat na te komen, in het bijzonder ten aanzien van kindslachtoffers en -getuigen. In de eerste plaats wordt het Statuut van Rome geanalyseerd, hetgeen het ICC niet alleen een helder, strafrechtelijk mandaat verschaft, maar ook eist dat het ICC de veiligheid en het welzijn van slachtoffers en getuigen respecteert – in het bijzonder diegenen die het meest kwetsbaar zijn, zoals kinderen. Ook worden andere voor het ICC toepasselijke wetten geanalyseerd.

Gedurende het eerste decennium van haar bestaan werd het ICC in haar eerste zaken met grote uitdagingen geconfronteerd bij het implementeren van de verplichtingen die voortvloeien uit het Statuut van Rome. De eerste zaak voor het ICC, *Prosecutor v. Thomas Lubanga Dyilo* (*Lubanga*-zaak), betrof uitsluitend beschuldigingen van indienstneming, rekrutering en gebruik van kinderen onder de leeftijd van 15 jaar om actief deel te nemen in vijandelijkheden. Deze zaak werd gekenmerkt door onvoorstelbare moeilijkheden, hetgeen kan verklaren waarom deze zaak na meer dan zeven jaar sinds de eerste verschijning van Lubanga voor de rechters in Den Haag, nog steeds aanhangig is. In de *Lubanga*-zaak stonden kinderen centraal. Daarmee biedt deze zaak inzicht in de voor- en nadelen van het ICC-mandaat dat jegens kinderen worden uitgevoerd. Helaas toont de *Lubanga*-zaak dat in de huidige ICC-praktijk de veiligheid, het lichamelijke en psychologische welzijn, de waardigheid en het privéleven van kinderen die in aanraking komen met het ICC, hetzij als getuigen

hetzij als slachtoffers, niet adequaat wordt beschermd. Moeten kinderen wel worden gevraagd te getuigen in internationale strafzaken (in het bijzonder *viva voce* in Den Haag)? Is het huidige participatiesysteem voor slachtoffers wel geschikt voor kindslachtoffers die misschien hun 'standpunten en zorgen' aan de ICC-rechters willen voorleggen, overeenkomstig artikel 68(3) van het Statuut van Rome?

Niettemin is het niet onderzoeken van misdaden begaan tegen kinderen (in het bijzonder indien de Aanklager informatie of bewijsmateriaal heeft ontvangen dat zulks is geschied) of het uitsluiten van kinderen van ICC-procedures (wanneer zulks niet in strijd is met hun belangen) niet geoorloofd, aangezien het Statuut van Rome en andere toepasselijke wetgeving erin voorzien dat kinderen speciale aandacht vereisen van het ICC. Maar deze wettelijke bepalingen zijn algemeen en daarom biedt andere toepasselijke wetgeving, overeenkomstig artikel 21 van het Statuut van Rome, een waardevolle oriëntatie teneinde een meer specifieke inhoud te kunnen geven aan begrippen zoals de 'behoefte van waardigheid en hun privéleven', en voor het doel van dit onderzoek, kinderen zoals voorzien in regel 86 van de *Rules of Procedure and Evidence* (RPE). Vandaar dat dit onderzoek een uitgebreide studie omvat naar het juridisch kader van het ICC vanuit het perspectief van kinderrechten, terwijl het gelijktijdig deze rechten afweegt tegen de rechten van de aangeklaagde en het recht op een eerlijk proces.

In dit onderzoek staat de volgende probleemstelling centraal:

> *Hoe zou in de ICC-procedures aan de belangen van kinderen invulling moeten worden gegeven overeenkomstig regel 86 van de RPE, teneinde: a) de veiligheid, het lichamelijke en psychologische welzijn, de waardigheid en het privéleven van kindslachtoffers en -getuigen te beschermen overeenkomstig artikel 68(1) van het Statuut van Rome; b) te garanderen dat er rekening wordt gehouden met de zienswijze van kindslachtoffers, zoals voorzien in artikel 68(3) van het Statuut van Rome; en c) schadevergoedingen toe te kennen aan kindslachtoffers overeenkomstig artikel 75 van het Statuut van Rome).*

Hoofdstuk 1 biedt een algemene inleiding in de rol van kinderen in hedendaagse gewapende conflicten, hetgeen de algemene context schetst van de situatie van kinderen die naar het ICC zullen komen, hetzij als slachtoffers of als getuigen van misdaden binnen diens jurisdictie. Eerst wordt beschreven hoe geweld tegen kinderen een oorlogswapen is geworden in vele hedendaagse gewapende conflicten. Vervolgens wordt het effect dat misdrijven tegen kinderen hebben op hun leven en op dat van hun families en gemeenschappen beschreven. In het hoofdstuk wordt niet slechts de rol van kinderen als slachtoffers van gewapende conflicten beschreven, maar wordt ook de ingewikkelde rol die kinderen zouden kunnen spelen als deelnemers in het vredes- en verzoeningsproces geanalyseerd, met inbegrip van hun deelname aan internationale strafprocessen, evenals in niet-gerechtelijke mechanismen. Zodoende

illustreert hoofdstuk 1 dat kinderslachtoffers en -getuigen niet slechts 'kwetsbare' individuen zijn. Kinderen die voor het ICC komen, kunnen ook daders zijn van misdrijven (hoewel niet binnen de ICC-jurisdictie). Eveneens, zouden kinderen die voor het ICC komen ten gevolge van een gewapend conflict, ook volwassener en onafhankelijker kunnen zijn dan kinderen in andere situaties. Deze analyse is belangrijk, omdat er met deze veelzijdige aspecten van kinderen in gewapende conflicten rekening moet worden gehouden bij de interactie met kinderen bij het ICC, beschreven in de hoofdstukken 5 en 6 van dit onderzoek.

Hoofdstuk 2 biedt een korte inleiding op het ICC, diens totstandkoming en belangrijkste organen. Dit wordt beschreven vanuit een kinderrechtenperspectief en zodoende wordt aandacht besteed aan de vraag hoe de verschillende organen van het ICC zouden moeten functioneren teneinde het mandaat van het ICC na te komen, overeenkomstig regel 86 van het RPE. Dit hoofdstuk is relevant omdat de organisatie en structuur van het ICC worden besproken; de verschillende organen en secties van het ICC die later genoemd worden in de hoofdstukken 5 en 6 van dit onderzoek. Ofschoon de inhoud van dit hoofdstuk misschien al bekend is voor lezers met kennis van het ICC, is het waardevol voor lezers die, hoewel goed op de hoogte van kinderrechten, niet bekend zijn met de structuur en het functioneren van het ICC.

Hoofdstuk 3 is gericht op het belang van andere internationale instrumenten voor de interpretatie en toepassing van bepalingen van het ICC-Statuut in procedures betreffende kinderslachtoffers en -getuigen. Dit hoofdstuk neemt als startpunt artikel 21 van het Statuut van Rome, en in het bijzonder paragraaf 3, welke eist dat ICC-rechters de wet interpreteren en toepassen overeenkomstig internationaal erkende mensenrechten. Waar het kinderen betreft, is het logische uitgangspunt het Internationaal Verdrag inzake de Rechten van het Kind (IVRK). Dit hoofdstuk verwijst ook naar andere juridische bronnen die, hoewel strikt genomen volgens artikel 21 van het Statuut van Rome geen toepasselijke regelgeving, zouden kunnen dienen ter oriëntatie voor ICC-rechters bij het interpreteren van het Statuut en de bewijs- en procedureregels (RPE). Ten slotte wordt in dit hoofdstuk internationale strafrechtspraak geanalyseerd die relevant en toepasbaar kan zijn voor kinderslachtoffers en -getuigen bij het ICC. In het bijzonder wordt de jurisprudentie van het Speciale Hof voor Sierra Leone geanalyseerd met betrekking tot de misdrijven van indienstneming, rekrutering en gebruik van kinderen. Bovendien wordt de jurisprudentie van de regionale mensenrechtengerechtshoven geanalyseerd. Van groot belang is voorts de jurisprudentie van het Inter-Amerikaanse Gerechtshof voor Mensenrechten specifiek met betrekking tot schadevergoedingen. De analyse die in hoofdstuk 3 wordt gepresenteerd, verschaft daarmee de juridische basis voor het gebruik van andere internationale instrumenten in de volgende hoofdstukken.

Hoofdstuk 4 richt zich op het materiële recht van het Statuut van Rome; het zogenaamde 'algemeen deel' ('general principles'). Het beschrijft in het kort de misdrijven waar het ICC rechtsmacht over heeft. In dit hoofdstuk wordt de omschrijving van misdrijven exclusief gepleegd tegen kinderen nader uitgewerkt, maar ook misdrijven die, ofschoon gepleegd tegen de gehele bevolking, disproportionele effecten hebben op kinderslachtoffers. Deze analyse is belangrijk, omdat kinderen met het ICC in aanraking zullen komen wanneer zij slachtoffers of getuigen zijn van misdrijven binnen diens jurisdictie. De analyse van delictsbestanddelen van misdrijven is noodzakelijk om te identificeren wie kinderslachtoffers (en mogelijk getuigen) zouden kunnen zijn. Ook is een dergelijke analyse nodig om vast te stellen of een kind een slachtoffer is binnen de ICC-jurisdictie overeenkomstig regel 85 van het RPE,. Daarnaast is een dergelijke analyse nodig om in schadevergoedingsprocedures de geleden schade vast te kunnen stellen. Die analyse in dit hoofdstuk is ook relevant ten behoeve van begrip voor de specifieke omstandigheden van kinderslachtoffers en -getuigen die zich tot het ICC richten en die beschermende of speciale maatregelen nodig hebben als gevolg van misdrijven (bijvoorbeeld een kindergetuige met een post-traumatische stress-stoornis als gevolg van seksueel geweld). Dus hoewel in dit hoofdstuk het materiële recht wordt geanalyseerd, is dit relevant voor de procedurele aspecten die worden besproken in de hoofdstukken 5 en 6 van dit onderzoek.

Hoofdstuk 5 is het *pièce de résistance* van dit onderzoek, aangezien het zich concentreert op de drie manieren waarop kinderen met het ICC in aanraking kunnen komen: als slachtoffer-deelnemers aan het proces, als getuigen en als begunstigden van schadevergoedingen. In dit hoofdstuk wordt het juridisch kader en de praktijk van het ICC geanalyseerd. Tevens wordt aan de hand van voorbeelden geïllustreerd hoe andere regelgeving betreffende de rechten van kinderen gebruikt zou kunnen worden in procedures waarin kinderen in aanraking komen met het ICC. In dit hoofdstuk worden verschillende methodes, standaarden en *best practices* voorgesteld die zouden kunnen worden toegepast in processen bij het ICC, zodat beter rekening kan worden gehouden met de belangen van kinderslachtoffers en -getuigen overeenkomstig regel 86 van de RPE.

In *hoofdstuk 6* wordt een serie aanbevelingen gepresenteerd die kunnen garanderen dat de actieve deelname van kinderslachtoffers aan strafprocedures en de schadevergoeding voor kinderslachtoffers, overeenkomstig internationale kinderrechtenstandaarden verloopt. In dit hoofdstuk worden tevens maatregelen voorgesteld die getroffen zouden kunnen worden wanneer kinderen als getuigen worden gehoord in ICC-procedures, zodat zij van deze ervaring niet getraumatiseerd raken terwijl tegelijkertijd, de rechten van de verdachte en een eerlijke en onpartijdige procedure worden gegarandeerd. Het hoofdstuk stelt ook een serie richtlijnen voor om het mandaat van het ICC zoals voorzien

in artikel 69 van het Statuut van Rome en regel 86 van de RPE te realiseren overeenkomstig internationale kinderrechtenstandaarden.

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Curriculum vitae

Cynthia Chamberlain (San José, Costa Rica, 1977) has had a passion for international law and human rights law from a very early age. She obtained her law degree (with honours) from the University of Costa Rica and was admitted to the Costa Rican Bar and appointed as a Public Notary in 2003. In 2005 she obtained a *Diploma de Estudios Avanzados* (DEA) from the *Universidad Autónoma de Madrid* and the *Universidad Complutense de Madrid*, Spain. She is an external Ph.D. Candidate in Leiden University since April 2007. From 2000 to 2003, Cynthia worked with the *Instituto Latinoamericano de las Naciones Unidas para la Prevención del Delito y el Tratamiento del Delincuente* (ILANUD) in Costa Rica, where she worked in the then ratification campaign for the entry into force of the Rome Statute. She also represented non-governmental organisations, presenting a shadow reports to the CEDAW Committee between 2000 and 2002. Since 2006, Cynthia works as a Legal Officer in the Chambers of the International Criminal Court.

In the range of books published by the Meijers Research Institute and Graduate School of Leiden Law School, Leiden University, the following titles were published in 2013 and 2014

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